IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 32.

WILLIAM R. WARNER & COMPANY, *Petitioner*

vs.

ELI LILLY AND COMPANY, *Respondent*

BRIEF FOR RESPONDENT

STATEMENT.

The following modifications in the statement for petitioner, (pp. 1-10 of petitioner's brief) are required, it is thought, in the interest of accuracy; otherwise there is no substantial disagreement as to the statement of the case:

Counsel for petitioner in Paragraph 2 of their statement, referring to defendant-petitioner's product, say that it was "known as" Quin-Coco. It should be ex-

plained that while it may have been "known as" Quin-Coco in immediate transactions relating to the product between defendant and its direct customer-distributors, it was not known by this name "Quin-Coco" to the consumers, except to a very limited extent, if at all.

The statement on page 2 of petitioner's brief that in the District Court plaintiff's bill was dismissed on the ground that the plaintiff had established no trade-mark rights in the name, color, physical appearance, or the formula of plaintiff's product known as Coco-Quinine, should, it is thought, be modified to state that the District Court found that "Coco-Quinine," the name by which plaintiff's product is known, is not an arbitrary name disclosing the derivation of the product from plaintiff, and that the defendant therefore has the right to use a combination name indicating the same facts in relation to its product, as for example, the name "Quin-Coco," and that plaintiff's formula not being patented, defendant had a lawful right to reproduce plaintiff's preparation, if it could, and to tell plaintiff's customers that it was the same thing as plaintiff's product, and to sell it as substitute for plaintiff's product.

ALL MATTERS IN ISSUE BEFORE THIS COURT.

Respondent agrees that the entire record is before this Court with the same power to decide all questions at issue which were presented to the Circuit Court of Appeals as that Court had.

THE ISSUES.

Respondent would submit that the questions presented to this Court for its determination are not fully

stated under Paragraph VII, page 5, of petitioner's brief but should be substantially as follows:

First. Whether or not, in view of the evidence, the imitation of the color and flavor of plaintiff's product by defendant, by using cocoa or chocolate as the coloring and flavoring medium, was necessary in order to enable defendant to enjoy the right it could fairly claim to manufacture and sell a medicine to compete with plaintiff's.

Second. Whether or not, in view of the evidence, the Court of Appeals was justified in its conclusions that:

> "Its (defendant's) efforts were expended not so much in making a compound that would act like the plaintiff's as they were in making a compound that would look like it and taste like it. It did not show the concern for the use of chocolate as a medium of color and taste that it showed in finding a chocolate that would give to its mixture the color and taste of the plaintiff's. In its laboratory it conducted experiments with chocolates of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded. It then placed the product on the market. It did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers, and represented to them that its new product, Quin-Coco, is the same as the plaintiff's Coco-Quinine (referring to the latter by trade name and maker's name); and that when Coco-Quinine is prescribed by a physician or asked for over the counter by a customer, Quin-Coco could be 'substituted without detection' and 'without anyone being the wiser.' Salesmen would at

> times pour both mixtures on paper to demonstrate the identity of colors. To induce druggists to make purchases the defendant represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable because Quin-Coco was cheaper."

and that such practices constitute fraud for which defendant is responsible.

Third. Whether or not the evidence shows such long, continued, and exclusive use by plaintiff of the name "Coco-Quinine" as the name for its product that said name, (even though this Court may agree with the Circuit Court of Appeals and the District Court that the name itself is not an arbitrary one but, rather, one that is descriptive of its ingredients) has acquired a secondary meaning as indicating the origin of plaintiff's product, and that plaintiff is therefore entitled to exclusive right to said name or any such near resemblance thereto, such as "Quin-Coco," as might be likely to cause confusion in the trade.

However, the defendant might as well use any other name so long as the retail druggist knows that that name spells "substitute for Lilly's Coco-Quinine." This is all "Quin-Coco" means to the retail druggist. He has no calls for "Quin-Coco," receives no prescriptions for "Quin-Coco" and consequently can not sell "Quin-Coco" except to sell it to supply the demand for Coco-Quinine, and as Coco-Quinine. This he does and he does it because he makes a little more money on the counterfeit, the substitute, than he can on the original.

DEFENDANT'S CALL FOR HELP.

Its Entire Force Instructed.

The bill of complaint in this case was filed in the District Court on December 22, 1914, and defendant's answer filed on January 29, 1915.

Shortly after the bill of complaint was filed, defendant in an effort to obtain evidence to disprove the allegations of plaintiff's bill, sent to its sales force a letter advising all its salesmen of the suit by plaintiff, setting out the chief allegations of said bill, instructing them what was needed as evidence to disprove the allegations of the bill, and calling upon them to help in obtaining proofs to refute these allegations.

A coppy of said letter was introduced in evidence as exhibit *"O'Connel Letter No. 4,"* and is printed in Vol. II, p. 983 of the record.

In this letter each salesman was told:

> "We need the help of the dispensing and prescribing doctor, the druggist, and yourself. A part of what we desire to establish is:
>
> (1) That you and all our travellers offered and solicited orders for Quin-Coco, as Quin-Coco, or a sweet chocolate quinine mixture or syrup.
>
> (2) That you did not suggest, urge, advise or instruct the trade to dispense Quin-Coco upon calls or prescriptions for 'Lilly's' Coco-Quinine.
>
> (3) That the druggists who purchased Quin-Coco differentiates between Quin-Coco and 'Lilly's' Coco-Quinine, dispensing each when specified on calls or recipes, and dispensing either upon calls or prescriptions specifying chocolate quinine or syrup of quinine or sweet quinine.
>
> (4) That general knowledge of 'Lilly's' Coco-Quinine is limited to the physician and drug trade, and that 'Lilly's' Coco-Quinine is not generally

known either by name or package to the general consumer or laity.

(5) That Quin-Coco is used and dispensed by the dispensing doctor.

(6) That Quin-Coco is prescribed under the name 'Quin-Coco' by the prescribing doctor.

(a) *We desire to locate and put in original prescriptions for Quin-Coco.*

(7) That Quin-Coco has been sold to parties who had never previously used 'Lily's' Coco-Quinine.

(8) That druggists dispense Quin-Coco labeled 'Quin-Coco' or labeled 'Syrup Quinine,' 'Syrup Chocolate Quinine,' or 'Sweet Chocolate Quinine.'

The purpose of such evidence is in part to prove a legitimate market for Quin-Coco and a sweet Chocolate syrup of quinine, and that neither Quin-Coco nor other chocolate quinine mixtures depend upon dispensing these on calls or receipes for 'Lily's' Coco-Quinine for their sale.

We desire this information as soon as possible and we will appreciate:

(1) Names of doctors who dispense Quin-Coco, or chocolate quinine mixtures other than 'Lilly's' Coco-Quinine.

(2) Names of doctors who prescribe Quin-Coco or chocolate quinine mixtures, other than 'Lilly's' Coco-Quinine.

(3) Names of druggists who have filled prescriptions for Quin-Coco or chocolate quinine mixtures other than 'Lilly's' Coco-Quinine.

(4) Names of druggists who have called for Quin-Coco or other chocolate quinine mixtures other than 'Lilly's' Coco-Quinine.

(5) Also whether you know or have reason to believe such parties would be willing to testify to these facts.''

The plan of defense decided upon and the evidence necessary to defeat plaintiff's case, as acknowledged

by defendant, is thus seen; and, further, it is shown that defendant's entire sales organization was instructed in this and put to work to help produce the character of evidence required and to establish such defense and "prove a *legitimate* market for Quin-Coco." Note that defendant thus admitted the need of proving a "*legitimate*" market and, by inference, that failing in obtaining such proof, that its market is *not legitimate.*

Defendant's entire sales force, traveling throughout the United States and visiting practically every drug-store in the country (Merner, pp. 1286-87, Qs. 58-62), was thus appealed to and instructed promptly after plaintiff's bill was filed.

Nearly two years were consumed in taking proofs in this case. An unusually large number of witnesses were examined on behalf of both parties, and from various sections of the country.

Notwithstanding all of the opportunity afforded and the large number of salesmen employed by defendant, it is interesting and suggestive to note that in the entire record defendant failed to produce a single witness or a single item of proof, other than the testimony of its own salesmen, in its employ at the time of giving testimony, and forming a part of the organization that had been working to obtain the needed evidence, in support of any of the points which it sought to obtain evidence to establish by its instructions in the Exhibit O'Connell letter No. 4, above quoted.

Defendant failed to locate and put in evidence a single original prescription written for Quin-Coco.

It failed to produce any evidence that Quin-Coco was ever sold to anyone who had not previously used Coco-Quinine.

It failed to produce the names of any doctors who dispense Quin-Coco or who prescribe Quin-Coco.

It failed to produce the names of druggists who have filled prescriptions for Quin-Coco or who have calls for Quin-Coco.

And it failed to produce as a witness a single druggist or physician in support of the points they hoped to establish to refute plaintiff's allegations.

On cross-examination of the numerous witnesses called by plaintiff one druggist in Brook Haven, Miss., and one in Richmond, Va., was found who had seen a prescription for Quin-Coco. All defendant's effort to otherwise secure such evidence was apparently an utter failure.

ARGUMENT.

Facts Proved by the Evidence.

Respondent contends that the evidence shows beyond any doubt facts as follows:

(*a*) That plaintiff was the first to produce and offer for the use of the medical profession a permanent medicine, or pharmaceutical preparation, in the form of a liquid preparation containing quinine sulphate in definite proportions with the bitterness of the quinine disguised;

(*b*) That the formula for such preparation was developed and perfected in plaintiff's laboratories by long experimentation;

(*c*) That the use of chocolate syrup in said preparation is of absolutely no consequence from a medicinal or therapeutical standpoint, was not any part of the medicinal formula and was only added after said formula was perfected to give a distinctive color and

flavor to the preparation and in order to readily identify its origin.

(*d*) That prior to the use of chocolate by plaintiff in this preparation no liquid medicine of permanent form, or ready to be administered, had ever been known to the drug trade or medical profession colored and flavored with cocoa or chocolate.

(*e*) That a multitude of other coloring and flavoring syrups or mediums were available for the use of defendant and others who might wish to manufacture and sell a medicine of identical therapeutic value to plaintiff's Coco-Quinine and offer it to the medical profession in legitimate competion;

(*f*) That defendant discovered plaintiff's formula for Coco-Quinine and reproduced the same as nearly as possible, not only as to its medicinal characteristics but also as to its non-essential color and flavor;

(*g*) That defendant having, as it believed, a perfect imitation of Coco-Quinine, then through its sales organization offered it to the trade to be sold as a substitute for Coco-Quinine, representing to the drug trade that it was identical with Lilly's Coco-Quinine not only in therapeutic value but in color and flavor, and that it could be dispensed on physicians' prescriptions written for Coco-Quinine, as well as in response to calls over the counter for Coco-Quinine, "without detection" or "without any one being the wiser," holding out as the inducement for the perpetration of the suggested fraud, that the druggist could make more money by handling Quin-Coco as defendant was selling it at $1.30 per gallon below the price of Coco-Quinine;

(*h*) That many retail druggists yielded to the persuasion and to the temptation for larger profits, purchased from defendant the product Quin-Coco, and

used it as suggested by defendant's salesmen in supplying the demand for Coco-Quinine, which demand had been created by plaintiff at great expense through extensive "detail" work with the medical profession;

(*i*) That defendant's product in many instances was shown to be inferior and that plaintiff was blamed for the unsatisfactory results which followed its use and to this extent the value of its good-will was impaired, and, moreover, the physicians and their patients imposed upon;

(*j*) That the sales policy of the defendant and the practices followed by its sales organization were directed and controlled by its officers and sales managers, and that the practices, as above outlined, as followed by its sales force were in direct response to instructions from headquarters and in line with the policy established by defendant's officers;

(*k*) That the same "Coco-Quinine" had become thoroughly established in the drug trade and medical profession by at least seven years' exclusive and extensive use by plaintiff before defendant entered the field, and that with a large number of users the name was synonymous with Chocolate Quinine, which name, in many instances, was used by customers in asking for the product and that calls for "Chocolate Quinine" always meant plaintiff's product as truly as when asked for by the name "Coco-Quinine";

(*l*) That in supplying Quin-Coco when Coco-Quinine was called for, retail druggists were "passing off" on their customers defendant's product when plaintiff's product was called for, thus committing a fraud, and this in accordance with the teachings and suggestions of defendant's sales organization, by direct authority from defandant;

(*m*) That the name "Quin-Coco" is little more than a mere reversal of the words composing the name "Coco-Quinine," is so similar to "Coco-Quinine" in significance that its use, if general, must inevitably cause confusion in the trade, and that the two names are so similar that they are readily used one for the other even by those perfectly familiar with both.

EVIDENCE SUPPORTING PLAINTIFF'S CONTENTIONS

(a) *Tasteless Liquid Quinine Preparation Original with Plaintiff.*

The history of the preparation of the formula which resulted in the product Coco-Quinine is told by Mr. Eberhardt, the chemist in plaintiff's laboratories who did the work. Mr. Eberhardt stated that he was instructed by Mr. J. K. Lilly, president of the plaintiff, to prepare a syrup containing quinine which would be palatable, to be put upon the market as a liquid preparation of quinine, and that he finally worked out the product which afterwards became known as Coco-Quinine. (Vol. I, p. 8, Q. 3.)

Mr. J. K. Lilly testified (p. 42, Q. 2) that prior to Coco-Quinine he had felt an urgent demand for a palatable liquid preparation of quinine and that to meet this demand Coco-Quinine was developed.

Prior to Coco-Quinine, both plaintiff and defendant had a preparation on the market which druggists used for preparing extemporaneous mixtures of quinine sulphate in liquid form, the Lilly preparation being known as "Yerbazin" and the defendant's preparation as "Quinamel."

The disguising agent in these preparations is Yerba-Santa as in Coco-Quinine, but neither is colored or flavored with chocolate, they were of different colors

(Hereth, p. 357, Q. 34) and both are used merely as a vehicle for the use of the druggist in putting up prescriptions for extemporaneous use and not for a permanent quinine mixture.

Coco-Quinine was the first medicine of permanent character consisting of a mixture of liquid syrups, preservatives, Yerba-Santa for disguising the bitterness of the quinine, and quinine sulphate. That no other such preparation was known to the drug trade prior to the time the product Coco-Quinine was put upon the market by plaintiff is shown by the testimony of many witnesses, comprising retail druggists, wholesale druggists, and physicians among whom are the following:

Knowles, p. 66, Q. 14.
Havenor, p. 72, Q. 4.
Van Schaak, p. 74, Q. 4.
Wolsey, p. 77, Q. 7.
Kinder, p. 81, Q. 3.
Schuh, p. 86, Q. 15.
Jennings, p. 94, Q. 18.
Blodau, p. 107, Q. 8.
Tague, p. 112, Q. 12.
Scott, p. 114, Q. 11.
Knox, p. 125, Q. 6.
Dr. Perkins, p. 132, Q. 5.
Dr. Fry, p. 141, Q. 4.
Richard, p. 144, Q. 13.
Chestnutt, p. 147, Q. 45.
Grigsby, p. 150, Q. 10.
Dr. Ferguson, p. 153, Q. 7.
G. A. Pheiffer, p. 1226, X-Q's. 210 and 211.
C. H. LaWall, p. 1274, X-Q's. 59 and 61.
W. H. Stone, p. 1251, Q. 38.
F. S. Hereth, p. 353, Q. 7.
Schaefer, p. 156, Q. 8.

Prochnow, p. 166, Q. 6.
Porter, p. 172, Q. 4.
Samson, p. 189, Q. 27.
Lyons, p. 190, Q. 7.
Heno, p. 201, Q. 5.
Walsdorf, p. 206, Q. 5.
Dr. Arrington, p. 209, Q. 7.
Ray, p. 210, Q. 4.
Ames, p. 218, Q. 5.
Fly, p. 225, Q. 6.
Albright, p. 236, Q. 4.
Vaughan, p. 254, Q. 3.
Northington, p. 254, Q. 6.
Cunningham, p. 282, Q. 4.
Arrington, p. 350, Q. 8.
Hereth, p. 353, Q. 7.

(b) *Coco-Quinine an Original Preparation Developed in Plaintiff's Laboratories.*

The testimony of Dr. Eberhardt (Vol. I, pp. 8-9) and the testimony of Mr. J. K. Lilly (Vol. I, pp. 42-43) fully substantiates plaintiff's claim in this respect.

(c) *Chocolate Non-Essential to Therapeutic Value of Preparation.*

Dr. Eberhardt testified that the idea of adding chocolate to the preparation come to him as a means of giving to it a distinctive color and an elegant flavor. He also produced the original record in his own handwriting in which he recorded the history of his experimental work, the record being written at the time. In this record under date of March, 1900, is the following:

"A series of experiments was made, using as a base Yerbazin (uncolored); Yerbazin, 3 & syp. 1; and Yerbazin 1 & syrup 1 with quinine alkaloid,

quinine sulphate, and quinine tannate, respectively. It was found that the alkaloid was the most and the tannate the least bitter. Also diluting the Yerbazin tended to develop the bitterness. To give a distinctive color both Cudbear and Carmine were used. It occurred to the writer that a syrup containing chocolate would give both a distinctive color and an elegant flavor. Eberhardt, p. 9, Q. 10.

A photographic copy of the page of the record in the witness' own handwriting was introduced in evidence and is one of plaintiff's exhibits (Document No. 2) in this case.

The non-essential character of the chocolate, in so far as the medicinal virtues of the preparation are concerned is thus clearly emphasized by the fact that the man who originated the formula and did the original experimental work in the developing and perfecting of the preparation completed his work in so far as the medicinal virtues of the preparation were concerned before giving any consideration to what color or flavor should be given to it. He then tried substance commonly used in medicinal preparations for such purpose—Cudbear and Carmine—and it is apparent that either might have been used or any one of many others, as will be presently shown, without in any way modifying or impairing the virtues of the preparation as a medicine. Dr. Eberhardt, however, on further consideration, decided to try chocolate to give to the preparation a distinctive color and a pleasant flavor.

Dr. Eberhardt was asked (p. 10, Q. 14) to state as a chemist whether or not other syrups than chocolate might be employed for the same purpose as the chocolate syrup was employed in Coco-Quinine. He replied:

"There is no question about that, because the preparation as a syrup was made up in an experimental way before the chocolate idea developed. That is to say, that a liquid preparation in which the bitterness of the quinine was disguised was made up before the chocolate idea was developed."

He was then asked to name other syrups which in his opinion might be employed for the purpose of giving a distinctive color and a distinctive flavor to the preparation. He replied:

"You could flavor it with orange or you might flavor it with any syrup or flavor that you might desire. Yould could add any coloring matter that you might desire. You might color it brown with caramel or red with carmine, or any other desirable color. The essential point is that Yerba-Santa be present in order to disguise the bitterness.

Witness produced samples of preparations, one made by the formula for Coco-Quinine omitting the cocoa or chocolate and the other made by the Coco-Quinine formula omitting the Yerba-Santa but containing the chocolate. These were introduced in evidence as complainant's "exhibit bottle No. 1" and complainant's "exhibit bottle No. 2," and are available to support the witness' opinion that the one without the chocolate is a perfect medicine in so far as being a palatable liquid medicine containing two grains of quinine sulphate to the dram, while the other containing the chocolate is absolutely impossible because of its bitterness, the chocolate in no degree serving to disguise the bitterness of the quinine.

Mr. J. K. Lilly under whose direction Dr. Eberhardt did the work, also testified (Vol. I, p. 42, Q. 2):

"We saw the necessity of giving our new preparation a characteristic color and flavor so that it

would be different from anything that had been previously used. We found a satisfactory color and flavor in chocolate and after considerable experimentation and having overcome many difficulties, the preparation was perfected and placed upon the market under the name 'Coco-Quinine.' * * * *Depending upon the characteristic color and flavor and the distinctive name, we expended considerable sums upon promoting its sales until it became one of our most important specialties.*"

Mr. Lilly also testified (p. 45, Q. 17) in respect to the purpose of the chocolate or cocoa in the preparation:

"It was selected as a color and a flavor for this preparation because there was not on the market a liquid preparation of quinine that contained cocoa, so it was selected to make it different from any other like preparation and to designate it as the Lilly product. Its presence is not essential to its palatability or quinine-disguising power."

JOHN M. FRANCIS, chief chemist of Parke, Davis & Company, one of plaintiff's largest competitors, testified (p. 57, Q. 4) in reference to the purpose of the chocolate or cocoa in the preparation:

"My opinion as to the utility of chocolate or cocoa in such a preparation would be that it serves the purpose of imparting to such preparation a distinctive flavor and a distinctive color. The use of such substance does not, in my opinion, impart to the mixture any characteristic medicinal action, nor does it modify the medicinal activity of the other ingredients involved."

CLIFTON H. BRIGGS, one of the research chemists employed by Parke, Davis & Company, testified in respect to the use of cocoa or chocolate in this preparation (p. 59, Q. 4):

"It is used as a flavor and in my estimation does not lend any particular properties as to covering up the taste of the quinine, and it also gives the color to the product."

In answer to Q. 5, Dr. Briggs also stated that:

"Other syrups of other colors and flavors might be used in the product instead of the chocolate and for the same purpose."

WITNESS HERETH, formerly one of the owners of the Searle & Hereth Company, the label of which concern is used by defendant on its product, and a chemist of many years' experience, was asked if in his judgment it would be possible to make a preparation to compete with Coco-Quinine as a medicine and flavored with other syrups than chocolate and of a different color. He replied:

"I think other preparations might be made to compete with it as far their ability to disguise the taste of quinine is concerned and at the same time retain the therapeutic efficiency of the quinine."

(d) *Chocolate Original with Plaintiff as Coloring and Flavoring Medium for Pharmaceuticals.*

MR. J. K. LILLY testified (p. 42, Q. 2) that cocoa was selected as a color and flavor because there was not on the market a liquid preparation of quinine that contained cocoa.

See also testimony of same witness, p. 894, Q. 5.

CHARLES H. LAWALL, one of defendant's experts, testified (p. 1275, X-Q. 61) that he knew of no other liquid medicinal preparation containing chocolate prior to the time he learned of plaintiff's preparation Coco-Quinine, which was shortly after the year 1900.

S. H. Hilton, a pharmacist of long and extensive experience and national reputation, testified (p. 1178, Q. 18) that Coco-Quinine was the first medicinal preparation with which he became acquainted in which cocoa or chocolate was used as the coloring and flavoring agent.

William H. Stone, assistant superintendent of H. K. Mulford & Co., and a man of long and extensive experience in the manufacture of pharmaceuticals, testified (p. 1251), X-Qs. 38-43) that he knew of no other liquid medicinal preparation using chocolate or cocoa as the flavoring syrup, and another later product of plaintiff, known as "Coco Emulsion."

A number of similar statements by other witnesses throughout the record prove conclusively that in so far as medicines of a permanent character in liquid form are concerned, cocoa or chocolate was an entirely new thing as a coloring or flavoring medium at the time it was adopted by Dr. Eberhardt and Mr. Lilly to characterize and indicate the origin of plaintiff's product which they named "Coco-Quinine."

It is a matter of common knowledge that most liquid medicines have from time immemorial been colored with different substances and that in many instances such substances also impart a flavor to the medicine. Many substances which had been and are still used for such purposes have been named by witnesses for both parties in the record. Perhaps Carmine, Cudbear, and caramel are most common. So far as the record shows, however, for all time prior to the year 1900 manufacturers of pharmaceuticals had been content to use other substances than chocolate to color and flavor their liquid products. This is stated with full knowledge of the fact that there are in the record certain

statements relative to attempts by retail druggists to mix quinine in chocolate syrup at the soda fountain for immediate administration, and of the single instance testified to by witness Blair (p. 1559, Qs. 16-20) that he at one time received at his retail drugstore an order by Dr. Samuel K. Ashton calling for a mixture of chocolate, Yerba-Santa, and quinine, which mixture he made up, but (X-Qs. 1-3) he could not say whether it was used, and said that the quantity made up was only about four ounces.

Such testimony does not negative the fact that plaintiff's product Coco-Quinine was the first pharmaceutical in liquid form of permanent character which was ever identified to the trade by chocolate or cocoa as the coloring and flavoring medium.

IDENTIFYING MEANS IN PREPARATION ITSELF NECESSARY.

The necessity of some medium in the preparation itself to distinguish it and identify its origin is seen from the fact that the preparation is sold "naked," as stated by the Court of Appeals. It is dispensed by druggists both when prescribed by physicians and when called for by customers, in small quantities in the usual drugstore prescription bottle, bearing the druggist's own label. The preparation is sold by the manufacturer to the drug trade in bulk packages and the druggist dispenses the same in his own prescription bottles, filled out of these bulk packages, usually pint, five-pint, and gallon bottles.

A large number of witnesses have testified that the preparation is dispensed as just stated.

The testimony of the witnesses is well summed up by witness Arrington (p. 350, Q. 13) where he states in answer to the question as to how the preparation is dispensed:

"In the amounts the physician usually writes for, in our own bottles under our own labels."

That this is the common practice, see also the testimony of many other witnesses among whom are the following:

Merithew, p. 60, Q. 4.
Knowles, p. 65, Q. 5.
Wright, p. 68, Q. 5.
Wolsey, p. 77, Qs. 4 and 5.
Kinder, p. 81, Qs. 5 and 6.
Schub, p. 86, Qs. 9 and 10.
Henckel, p. 87, Q. 4.
Jennings, p. 92, Q. 3.
Sand, p. 103 Qs. 5 and 6.
Manning, p. 109, Q. 3.
Scott, p. 114, Q. 7.
Bond, p. 122, Q. 11.
Bordeaux, p. 123, Q. 3.
Bracy, p. 124, Q. 6.
Knox, p. 125, Q. 7.
Bolden, p. 126, Q. 4.
Soulier, p. 128, Q. 5.
Bowden, p. 138, Q. 5.
Chestnutt, p. 147, Q. 6.
Foster, p. 152, Q. 3.
Schaefer, p. 155, Q. 5.
Porter, p. 172, Q. 5.
Banes, p. 180, Qs. 5 and 7.
Samson, p. 187, Qs. 4 and 7.
Heno, p. 201, Q. 6.
Walsdorf, p. 206, Q. 4.
Ames, F. I., p. 217, Q. 3.
Ames, W. S. p. 217, Q. 3.
McMillan, p. 244, Q. 3.
Vaughan, p. 254, Q. 4.
Daly, p. 256, Q. 4.
Barber, p. 260, Q. 5.

Reid, p. 272, Q. 5.
Moseley, p. 277, Q. 7.
Cunningham, p. 282, Q. 6.
Moore, p. 284, Q. 5.
Garber, p. 329, Qs. 5-8.
Garber, p. 332, X-Q. 31.
Lindsay, p. 332, Qs. 4 and 5.
Whitley, p. 387, Q. 7.

The evidence thus clearly justifies the conclusions of the Court of Appeals that the preparation is sold "naked" and without the protection of the manufacturer's label and that the only means of identifying the origin of plaintiff's product is by the color and the flavor imparted thereto by the use of the non-essential ingredient cocoa; and therefore *the public can be protected against having imitation products palmed off upon it only by the identifying color and the identifying flavor of the preparation itself.*

(e) *Other Substances Available for Use of Defendant as a Coloring and Flavoring Medium for its Product.*

The testimony of Dr. Eberhardt (p. 9, Q. 10) already referred to shows that Cudbear and Carmine might have been used.

That it is entirely feasible for a competitor to manufacture and sell a palatable qūinine medicine in liquid form in competition with plaintiff's Coco-Quinine and without using chocolate in the preparation is shown by the testimony of witness Thorburn, chief chemist for the Pitman Moore Company, manufacturing pharmacists and a direct competitor with plaintiff.

Witness Thorburn was asked to state, as a chemist, whether or not it is possible to make a liquid quinine

preparation without the use of chocolate or cocoa that would be successful from a therapeutical and commercial standpoint (p. 32, Q. 15). He replied that it was and (Q. 16) that he did not regard the chocolate as essential to any therapeutic value of Coco-Quinine. He was then asked (Q. 17) if it would not be possible to make liquid quinine preparations flavored with other syrups than chocolate and, if so, to suggest some such syrups. He replied that quinine syrups are often made with Yerba-Santa and flavors added, such as anise, coriander, and other sweet essential oils. In answer to X-Q. 20, he explained that his Company sells a competing medicine flavored with lemon and another similar preparation flavored with peppermint, one a white and the other a yellow color, saying:

> "Each meets every demand made on us by customers for a tasteless quinine preparation. We consider it one of our successful preparations."

He also stated (X-Q. 21) that they frequently made similar preparations using anise, coriander or licorice and sold them in retail drug stores.

Witness Jennings (p. 94, Qs. 19-22) testified respecting another tasteless quinine preparation called Febriline, of a nearly white color and flavored with orange.

Witness Franklin (p. 305, X-Q. 13 and RDQ. 15) also testified concerning other makes of liquid quinine preparations not containing chocolate or of a chocolate color.

Witness Cavedo (p. 328, RDQ. 35-37) testified that he handled Sharpe & Doehme's syrup of quinine and also Febriline, and that neither of these products was colored or flavored with chocolate, the Sharpe & Doehme product being light straw color.

Witness Arrington (p. 351, RDQ. 19) testified as to the same products.

Dr. George M. Beringer, one of defendant's experts, when questioned on this subject, while contending that chocolate plays an essential part in the preparation admitted (p. 1509, Q. 28) that the medicinal properties of the preparation would not be altered if syrups or other colors and flavors were used, but that its "physical properties" would be altered.

Dr. Charles H. La Wall, defendant's other expert witness, testified (p. 1275, X-Qs. 65-67) that it is common practice in many preparations to add an ingredient for coloring purposes, such as caramel, cochineal, Cudbear and coal tar colors.

He also testified (X-Q. 61) that he knew of no other liquid medicinal preparation containing chocolate and (X-Q. 60) that at the time he first learned of the preparation known as Coco-Quinine, made by El Liilly and Company, he knew of no other similar preparation on the market.

Bibbin's Experiments.

In order to demonstrate beyond dispute the practicability of making a palatable liquid medicine containing quinine sulphate in the preparations commonly prescribed as required by the Coco-Quinine formula, plaintiff had one of its research chemists make up a number of samples, using the Coco-Quinine formula except to omit chocolate as the coloring and flavoring medium and substitute other substances to obtain different flavors and different colors for the various samples. Ten of such samples were made up and bottles containing quantities thereof were introduced in evi-

dence and marked "Plaintiff's exhibits, Sample Syrup No. 1 to No. 10, inclusive." (Vol. II, pp. 826-830, Qs. 5 and 6.)

Mr. Bibbins had previously testified as a chemist (p. 825, Q's. 3-4) that he had made many experiments and found that it was not necessary to use chocolate to disguise the taste of quinine sulphate or to aid in suspending it in a syrup medium, and that other substances can be used equally as well.

In explaining the mediums used in his samples Nos. 1 to 10, inclusive, he explained that instead of chocolate he used other mediums, as follows:

No. 1: Ginger and mucilage of quince seed and tragacanth.
No. 2: Tolu and gelatine and mucilage of quince seed.
No. 3: Orange and gum acacia.
No. 4: Coffee and dextrine.
No. 5: Peppermint and mucilage of quince seed.
No. 6: Benzaldehyde and mucilage of Irish moss and quince seed.
No. 7: Peppermint and wintergreen with mucilage of tragacanth and acacia.
No. 8: Compounded spirit of orange with starch of mucilage of tragacanth.
No. 9: Peppermint and wintergreen with gelatine and tragacanth.
No. 10: Peppermint, sassafras and wintergreen with acacia and mucilage of quince seed.

He testified (p. 830, Q's. 78) that any and all of them would make a satisfactory marketable product and that they are in all respects the same as Coco-Quinine except that other syrups have been substituted as the coloring and flavoring medium.

These samples were made in March, 1916, and are still in evidence.

The witness further testified (p. 831, Qs. 19-20) that still other coloring and flavoring mediums might be employed as he had not exhausted his resources in making up syrups for these samples.

Dr. James H. Beall, director of pharmacy research at the University of the State of Illinois, called as a witness for plaintiff, after stating his qualifications to testify as an expert (pp. 1030-1031, Qs. 2-3) testified (p. 1031, Q. 4) that he had examined the several Bibbins samples and had known of the existence of Coco-Quinine and Quin-Coco for some years; and (pp. 1032-1040, Qs. 5-16) in respect to these samples, that he found them satisfactory as pharmaceutical preparations, and (p. 1041, Q. 17) that he regarded all of these Bibbins experiments as successful. While he regarded some as better than others, the chief differences were in the matter of palatability. In four samples out of the ten he found the bitterness of the quinine well disguised; in two of the others sufficiently well disguised to be satisfactory as pharmaceutical preparations, and (Q. 18) these being mere experiments, it would be possible by further experimentation to perfect the formulas of the others found deficient so as to make them entirely satisfactory.

Dr. Beringer had contended for defendant that the chocolate served an essential purpose in the preparation as a suspending medium and necessary in order to insure a uniform distribution of the quinine content throughout the syrup. It is significant that the bottles containing both plaintiff's preparation and defendant's preparation bear around the necks of the bottles a label with the words "Shake Well" in large type.

Dr. Beal testified (p. 1042, Q. 20) that such labels were necessary in such preparations in order to insure an even distribution of the midicine throughout the liquid, and (Q. 22) that he could not agree with Dr. Beringer for, in his opinion, separation must take place in such preparations and it is necessary to correct such separation by means of the "Shake Label" employed.

Dr. Beal further testified (p. 1053, RXQ. 57) that the suspending powers of chocolate are not equal to many other well known substances.

Mr. Charles E. Caspari, of St. Louis, a chemical expert of wide reputation, was called as a witness for plaintiff and after stating his qualifications (pp. 1061-1062, Qs. 2-4) was questioned respecting the Bibbins sample syrups, Nos. 1 to 10, respectively, and (pp. 1062-87, Qs. 5-42) testified respecting his examination of said samples, and his chemical tests of the same in view of the criticisms thereof by Dr. Beringer, refuting completely all of Dr. Beringer's reasons for contending that such preparations would not be satisfactory as pharmaceuticals and good competitors with Coco-Quinine as liquid quinine medicines.

Mr. Caspari pointed out (Qs. 38-40) a glaring misstatement made by Dr. Beringer in his testimony for defendant respecting the use of coal tar dies as coloring substances.

He also pointed out (p. 1088, Q. 45) that neither Coco-Quinine nor Quin-Coco is a homogeneous preparation but upon standing only a comparatively short time, the quinine sulphate separates out of the syrup, thus making it necessary to use a "Shake Label" on the bottles to insure uniformity of doses in dispensing.

He testified further (Q. 46) that each and every one of the ten Bibbins samples is far more homogene-

ous than either Coco-Quinine or Quin-Coco, and that the quinine sulphate is much more uniformy and permanently distributed in the Bibbins samples than in either Coco-Quinine or Quin-Coco, and that least four of the samples, Nos. 2, 4, 5, and 6, are just as free from bitterness as are Coco-Quinine and Quin-Coco.

The witness further testified (Qs. 48-49) that he had examined exhibit bottle No. 1 and exhibit bottle No. 2, containing the samples prepared by Mr. Eberhardt, introduced as evidence during the taking of his testimony on March 22, 1915, had tasted said samples, and found that No. 1 with the chocolate omitted was entirely free from bitter taste, proving that the chocolate or cocoa has nothing to do with masking the bitterness of the quinine, and that he had tasted the contents of exhibit bottle No. 2 made according to the Coco-Quinine formula with the Yerba-Santa omitted, and found it extremely bitter, again showing that the chocolate has nothing to do with masking the bitterness of the quinine.

The witness further testified (p. 1093, Q. 70) that the unqualified success of four experiments in ten and a somewhat less success with the other six, is a very high percentage of successful experiments in making pharmaceutical and chemical preparations, it being a frequent experience that a great many experiments are required before even a single pharmaceutical article is obtained.

F. C. Atkinson, a chemist of large experience, called as a witness for plaintiff, after stating his qualifications to testify as an expert (p. 1114, Q. 2) testified (Qs. 3-4) completely refuting certain of Dr. Beringer's criticisms of substances used by Mr. Bibbins and showing that they were unfounded and ridiculous.

ANDREW L. WINTON, another chemist and microscopist of large experience, called as a witness for plaintiff, after stating his qualifications to testify as an expert (pp. 1123-1124, Qs. 2-4) was asked to testify concerning his examination of the Bibbins samples, Nos. 1 to 10, in the light of certain criticisms thereof by defendant's expert Beringer, and showed conclusively in his testimony (pp. 1125-1160, Qs. 5-50) that Beringer's criticisms were unfounded, completely answering all of Dr. Beringer's criticisms respecting the substances used in the Bibbins samples as undesirable for pharmaceuticals, and pointing out wherein in many instances the substances used were even more desirable for certain purposes than chocolate. It is hardly necessary to quote from the elaborate answers of this witness, but sufficient to say that he takes up in detail every criticism or objection made by Dr. Beringer to the ingredients used in the Bibbins samples and shows conclusively that Dr. Beringer in his testimony for defendant was either testifying without knowledge of his subject or giving most prejudiced testimony, and further by elaborate experiments and charts showing the results thereof that Dr. Beringer's opinions on the question of suspension were clearly unfounded.

SAMUEL L. HILTON, a pharmacist of national reputation and long experience, called as a witness for plaintiff, after testifying as to his qualifications to testify as an expert (p. 1170, Qs. 2-3) was asked to testify as to his opinion respecting the Bibbins samples as pharmaceutical preparations. He was asked in respect to samples Nos. 2, 4, 5, and 6, and stated (last paragraph of answer to Q. 8):

"Collectively I consider all four samples elegant marketable preparations that would enjoy a large sale if they were properly exploited."

He testified further (Q. 9) that he could not agree with Mr. Beringer that either of the four samples developed any more bitterness than Coco-Quinine, and expressed the opinion that in appearance these four samples show up as "better pharmaceutical preparatins than Coco-Quinine."

In respect to the other samples he stated (Q. 10) that No. 1 was, in his judgment, but little inferior as a pharmaceutical preparation to the others and would, no doubt, be acceptable to a majority of users; that as to sample No. 9 he could see no objection to it as a phamaceutical preparation, having a decidedly pleasant flavor and that he believed both samples No. 1 and No. 9 to be marketable preparations such as would enjoy a large sale if proper exploited and superior to many preparations on the market at the present time.

In respect to samples Nos. 3, 7, 8, and 10, he testified (Q. 11) that they could all probably be improved with experimentation, but that he considered them marketable preparations in their present conditions and "far better than many preparations that are sold by the retail pharmacist today."

He testified further (Qs. 12-13), that it is not necessary to have perfect homogeneity in a medicine and that it is practically unobtainable and that "Shake Well label" on the bottle is necessary when the medicine contains a medicament held in suspension.

The witness also testified in respect to complainant's exhibits Bottles No. 1 and No. 2, introduced in the Eberhardt testimony, that No. 1, containing all of the constituents of Coco-Quinine except cocoa, he

found in good condition, pleasing odor, and no more bitter than Coco-Quinine or the preparations, Bibbins' samples Nos. 2, 4, 5, and 6, and he could see no reason why it was not a marketable preparation the same as the other samples; that as to sample Bibbins Bottle No. 2, containing all of the ingredients of Coco-Quinine except Yerba-Santa, that the bitterness develops instantly. Witnesses testifying that they thought chocolate an essential ingredient admitted that they never tried to make a competing medicine without it.

Stone, p. 1251, Q. 37.
King, p. 1263, X-Q. 34.
LaWall, p. 1274, X-Q. 56.

The record does not show that the defendant ever made any experiments to ascertain if there were any other substances than chocolate or cocoa which could be used to impart a distinctive color and taste, so that the consumer would recognize its product as distinctive from that of plaintiff, but rather than all its efforts were directed to *duplicate* the color and flavor of plaintiff's product.

Thus plaintiff has established by abundant proof its contention that cocoa or chocolate is non-essential in the preparation and that the field of competition was wide open to defendant without using chocolate had it desired to enter on a fair basis and build up a demand for its own product at its own expense and by its own efforts.

(f) *Defendant's Efforts to Reproduce Plaintiff's Product in Physical Appearance as well as in Medicinal Virtue.*

That defendant, as stated in the opinion of the Court of Appeals, conducted experiments with chocolates of

different kinds in an effort to get the precise color and taste derived from the chocolates used by plaintiff is shown by the testimony of witness Groves, who, although employed by plaintiff at the time he testified, had for a number of years been in the employ of the defendant concern.

Mr. Groves testified (p. 360, Qs. 20 et seq.) that during the latter part of 1908 defendant's superintendent (Harry Fritsch) was experimenting in its laboratories in Philadelphia endeavoring to produce Quin-Coco but was unable to make a satisfactory product because he had not at that time received the working formula from defendant's laboratories in St. Louis. He stated (Q. 25):

> "In the latter part of 1908, the superintendent in charge of the wet room department was experimenting on Quin-Coco to get it as near the product manufactured by Eli Lilly and Company as possible. He made several samples but none of them came up to the consistency or *color* of the product manufactured by Eli Lilly and Company, and it was not until the formula came from St. Louis that they found the chocolate they were using in Philadelphia was different from what they were using in St. Louis."

He explained (Q. 26) that during these experiments they had samples of Coco-Quinine manufactured by plaintiff before them and that the results of their experiments were compared with plaintiff's product as the experiments progressed. He explained further (Q. 28) that the superintendent "did his utmost to make a product similar in color to that of the Lilly product."

He also explained (Q. 31) that these experiments were submitted to the General Manager, and (Q. 34) that the General Manager was Mr. G. A. Pfeiffer, the same G. A. Pfeiffer who is Treasurer and General Manager of the defendant concern. The said G. A. Pfeiffer was present in the room while the witness was testifying, as appears on the record.

William S. Garvin.

It appeared from the statements of witnesses during the taking of the testimony that one William S. Garvin was the chief chemist in charge of the St. Louis laborataries of the defendant concern and that Mr. Garvin was supposed to be the man who had developed the formula for Quin-Coco. Although Mr. Garvin's name was frequently used in connection with events incident to the manufacture and sale of Quin-Coco, he was not called as a witness by defendant and it being desired to question him respecting his connection with and work upon the Quin-Coco formula, he was subpoened as a witness for plaintiff.

The subpoena being served only in time for the witness to get to the place designated for his examination at the hour set, he was not given an opportunity for much preparation, but, of course, proved not only an unwilling but a hostile witness, endeavoring as best he could to serve defendant, his employer. He was asked (Vol. II, p. 707, Q. 6) to give a statement respecting the history of the preparation Quin-Coco. He acknowledged that he did the work; that (Q. 7) Mr. Merner gave him instructions on behalf of the company. He could not recall whether either Mr. Henry Pfeiffer or Mr. G. A. Pfeiffer talked with him about it (Qs. 10-11)

and could not remember (Q. 12) when Mr. Merner first brought up the subject. He did remember of seeing Mr. Henry Pfeiffer at the St. Louis laboratories (Q. 13) and also of seeing Mr. G. A. Pfeiffer there (Q. 14) and admitted that he was personally acquainted with both of them (Q. 15). He did not know what Mr. Merner said to him on the subject (Q. 17). After considerable questioning, he said (Q. 21) that Mr. Merner said to him that they would like to have a preparation "generally known" as a chocolate syrup quinine.

It may be observed that plaintiff's Coco-Quinine must have been the preparation thus designated, it being the only "generally known" thing of the kind at that time.

He did not remember (Q. 24) whether anything was said about the Lilly preparation Coco-Quinine. He admitted, however (Q. 25), that they did have a bottle of the Lilly preparation in the laboratory while he was conducting his experiments. He admitted the need of coaching, but when asked what use they made of the sample bottle of the Lilly preparation, he stated:

> *"Looked at it to see if the physical appearance was somewhat similar to Lilly's.*

Here is the admission of Mr. Garvin himself that in his work on Quin-Coco he had before him for comparison a sample of plaintiff's preparation Coco-Quinine and that his efforts were directed, as found by the Court of Appeals, more to reproducing plaintiff's product in "physical appearance," that is, in color and flavor, than in its medicinal properties and virtues.

Groves-Fritsch Testimony.

The testimony of plaintiff's witness Groves relating the efforts made by Mr. Harry Fritsch to duplicate plaintiff's Coco-Quinine in the laboratories of Wm. R. Warner & Company in the fall of 1908, was, of course, denied by Mr. Fritsch who was still employed by the defendant concern and who denied specifically the statements by Mr. Groves (pp. 1494-1496). On cross-examination, however (pp. 1499-1500), witness admitted having done exactly what Groves said he did, but explained that this was before the Pfeiffers obtained control of the Wm. R. Warner & Company and that what he did was for the old Wm. R. Warner & Company and not the defendant concern. He admitted making the experiments, he admitted having the sample bottle of Lilly's Coco-Quinine for comparisons, he admitted consulting with Mr. Groves as to the comparison; in fact, he admitted everything that Mr. Groves alleged except the date. He stated (p. 1503, X-Q. 109) that he depended wholly upon his memory for his statements.

Mr. Groves when recalled to rebut the testimony by Mr. Fritsch (p. 775, Q. 2) testified that Mr. Fritsch did not assume charge of the Warner laboratories for some weeks after the Pfeiffers obtained control. The man in charge of the Warner laboratories was John E. McCambridge. Mr. Groves was very clear and explicit in his answers, stating that the experiments on Quin-Coco by Mr. Fritsch were after Mr. McCambridge had left Wm. R. Warner & Company, and that he was there until the fall of 1908, and that Mr. Fritsch could not have done any experimenting on any preparation while Mr. McCambridge was there without Mr. McCambridge's knowledge and sanction.

The witness explained (Q. 3) definitely where the experiments were carried on and the means employd. He testified further (p. 779, X-Q. 18) that Mr. Fritsch had no authority to make experiments relating to Coco-Quinine in the spring of 1908 without the knowledge of John E. McCambridge, who was the general superintendent. The witness also denied (X-Q. 29) knowledge of any experiments by Warner & Company in 1907 or spring of 1908 on a chocolate quinine preparation.

Mr. John E. McCambridge, called as a witness for plaintiff, testified (pp. 702-704, Qs. 2-11) that he was in the employ of Wm. R. Warner & Company from March, 1877, until August, 1908, when the Pfeiffer Chemical Company took control of the business; that he was in charge of the laboratories of Wm. R. Warner & Company in Philadelphia during 1907 and during the year 1908 up to the time when his connection with the company was severed; that this connection was severed about three weeks after the Pfeiffer Chemical Company took control; that Mr. Harry Fritsch was a part of his force and worked under him making preparations that were called for to fill the stock; that he was personally aware of the work done by Mr. Fritsch day by day and that it was done under his superintendence.

The testimony of Mr. Fritsch relating to experiments which he (Fritsch) claimed were done in an effort to make a preparation similar to Coco-Quinine, Lilly, in the early part of 1908 and in 1907 were called to Mr. McCambridge's attention and the witness stated: (pp. 703-4, Q. 10).

"No such experiments were conducted."

He was then asked (Q. 11) if it would have been like-

ly or possible for Mr. Fritsch to have carried on such experiments in the laboratory without his knowledge. The witness replied:

"It would not."

Mr. McCambridge testified (p. 705, X-Qs. 15-18) that during the years 1907 and 1908 up to the time he left, that no experimenting with new preparations was carried on; that there were none; and that it was a part of his duty (X-Q. 20) to keep a record of all preparations made in the liquid department.

Then Mr. Fritsch was again called by defendant and testified (p. 767, Q. 36) that he received his instructions for the experiments which he says he made in 1907 or early part of 1908 from Mr. George Martin.

An attempt was made to show that the laboratory was quite a large place employing a good many people and that Mr. Fritsch might have carried on the experiments without Mr. McCambridge's knowledge. Mr. Fritsch admits that G. A. Pfeiffer talked with him on the subject after he came to Philadelphia (p. 768, Qs. 37-41).

Mr. McCambridge was again called (p. 833) and testified (p. 835, Qs. 2-4) that the department was 40x48 and employed four people, Mr. Harry Fritsch, Mr. Edward Ryan, a helper to Mr. Fritsch, a young man named Charlie, and Mr. Groves, who also was a helper.

The witness further testified (Qs. 6-12) that new preparations were first referred to him and that they were then passed on to Mr. Fritsch if it was found that he could handle them; that during all his connection with Wm. R. Warner & Company he could not recall that they ever secured a sample of goods of another house to imitate; that any order coming to

the laboratory to reproduce a specialty of any other house would have been a very unusual occurrence; and that Mr. Martin, Mr. Ramsey, and himself would certainly have known all about it and it could not have easily been forgotten; that the former Wm. R. Warner & Company under its established policy would not at any time (Q. 11) "consider the manufacture of a substitute of any other firm's preparation."

On cross-examination counsel for defendant endeavored to obtain from the witness an admission that if so instructed by Mr. Warner, Mr. Fritsch might have done this experimenting in some clandestine way unknown to Mr. McCambridge or at some period when Mr. McCambridge was absent. As to this the witness said (p. 839, X-Q. 17):

> "There would have been no reason for Mr. Warner to have done this if his object was to market the article, and I feel positive that he never so instructed Mr. Fritsch, because everything was done over and above board. The special formulas regarding the preparations of the house were in my own keeping, and if Mr. Warner had wanted this preparation made in secret he would have referred it to me, as he had done with other preparations that we manufactured."

Counsel pursued this line of questioning, asking the witness to suppose that Mr. Warner wanted Fritsch to do this thing and did not want McCambridge to know anything about it. The witness replied (X-Q. 18):

> "Of course, there is nothing that is not possible, if you want to put it down that way, but the personal confidence that Mr. Warner had in me

would not have permitted him to do an underhand trick, as I would call that, because he knew that I was not a man to stand for a thing like that. Furthermore, it would have been impossible, as I said in my previous testimony, for Mr. Fritsch to do any experimenting without my knowledge as I was in that department at least once every hour throughout the day."

JOHN E. MCCAMBRIDGE, JR., was also called as a witness for plaintiff and testified (p. 847, Q. 2) that he was employed by Wm. R. Warner & Company from June, 1901, until the middle of August, 1908, and (Q. 3) that he was a helper in the laboratories from 1901 to 1904 and was then in charge of the analytical department; that (Q. 4) he knew Harry Fritsch, and (Q. 5) Mr. Fritsch was an employee who worked in the pharmaceutical department under the instruction of Mr. J. E. McCambridge, the witness' father; that (Q. 6) he had no recollection of any experiments in an endeavor to make a duplicate of Coco-Quinine, Lilly, during the early part of 1908 or in 1907; and (Qs. 7-8) that such experiments would have been likely to have been called to his attention.

The witness explained (Q. 9) that the laboratory employed about four people, that his pharmaceutical department was very small in size and so concentrated that he knew what was going on at all times and the experiments made from time to time were always compared, the employees conferring with each other on the products.

FRANK M. RAMSEY, a witness called by plaintiff, testified (p. 769, Q. 2) that he was connected with the house of Wm. R. Warner & Company from September, 1871, until about November, 1908, and for the last

ten years of his service was general manager of the concern; that (Q. 3) he knew Mr. John E. McCambridge who was superintendent of the wet laboratory, which position he occupied for a number of years, and was connected with the concern for a long time; that (Q. 4) he knew Mr. Harry Fritsch as an assistant to Mr. McCambridge and up until the time he left. The witness further testified (Q. 7) that he had no knowledge of any experiments made in the laboratories during the early part of 1908 or 1907 for making a chocolate quinine preparation similar to Lilly's Coco-Quinine; and (Q. 8) that he did not authorize anyone to make such experiments; and (Q. 9) the man who would naturally have had charge of such experiments had they been made, would be Mr. McCambridge. Further that (Q. 10) Mr. George Martin was originally a clerk in the drug department but after closing that department his duties were general; that he was under him in authority (Q. 11) and (Q. 12) did not have authority to direct the preparation of a new formula or new preparations.

Mr. George Martin, called as a witness for plaintiff, testified (pp. 790-791, Qs. 2-4) that he was with Wm. R. Warner & Company for about seven years, having left in January, 1909, and was assistant to the manager, Mr. Frank Ramsey; that Mr. Ramsey was the custodian of all formulas; and that he had no recollection of instructing Mr. Harry Fritsch during the years 1907 or the spring of 1908 (as testified to by Mr. Fritsch) to make any experiments in an effort to reproduce Lilly's preparation Coco-Quinine.

On cross-examination counsel for defendant endeavored to make it appear that Mr. Warner might have given the instructions to Mr. Fritsch to make the

experiments and Mr. Martin admitted that this might have been, but it should be borne in mind that Mr. Martin is the man whom Mr. Fritsch finally selected as the one from whom he obtained his instructions.

Considering the enviable reputation of the Wm. R. Warner house under the management of Mr. William R. Warner, and the further fact that the new management dispensed with the services of the former general manager, and his assistant, and the general superintendent and the head of the analytical department shortly after obtaining control, it seems that the "inherent probabilities" are that Mr. Groves' testimony is true. If the testimony of Fritsch himself, one of defendant's employees at the time he testified, is sufficient to cause any doubt as to the truth of the testimony by Groves, that doubt should certainly be dispelled by the testimony of Mr. Ramsey, Mr. Cambridge, Sr., Mr. McCambridge, Jr., and Mr. Martin, all of whom were in a position to know of the fact had the experiments occurred during the period specified by Mr. Fritsch.

Moreover, it should be remembered that we have the testimony of Mr. William S. Garvin, the acknowledged original perpetrator of the Quin-Coco imitation, admitting that during his experiments he had a sample bottle of Lilly's Coco-Quinine to use for comparison and that the use he made of it was to:

> "Look at it to see if *the physical appearance* of the sample on which I was working was somewhat similar to Lilly's" (p. 710, Q. 27).

In view of the testimony it is submitted that the "inherent probabilities" point in the direction of plaintiff's contentions; but plaintiff is not dependent upon

inherent probabilities to support said contentions, the facts relied upon having been abundantly proved.

(g) *Defendant's Methods.*

Plaintiff's allegations in its bill of complaint respecting the methods employed by defendant in the sale of its product Quin-Coco are established beyond question by a multitude of witnesses.

WITNESS HOOPER (Vol. 1, p. 15), a salesman working for plaintiff at the time he testified, but formerly a salesman for the Pfeiffer Chemical Company, one of the defendant associated companies, testified that he was instructed by Mr. Stevenson, in charge of the Pacific Coast business of his employer, to sell Quin-Coco as a substitute for Coco-Quinine, and that this, in fact, was the only way he could sell Quin-Coco as there was no demand for it by its own name; that in making sales of Quin-Coco he told the druggist that it was exactly the same as Coco-Quinine, made by Lilly, and that it would cost less money; and that the druggist could use Quin-Coco on physicians' prescriptions for Coco-Quinine, the products being so similar that the druggist "need not be afraid of detection." (P. 15, Q. 6.)

The witness also identified a document which was offered in evidence as plaintiff's exhibit document No. 3 (afterwards commonly referred to by both sides as the "Blue List"), on which were listed by their well recognized trade names numerous leading pharmaceutical specialties of other concerns with the prices charged for the original preparations by the proprietors and in parallel columns the names of defendant's substitute preparations and its price for such substitutes. Witness stated that this list was given to him

by Mr. Stevenson to post himself in reference to his competitors' items, and that he understood from the document that Quin-Coco was a substitute preparation for Coco-Quinine. (Pp. 17-18, Qs. 12-17.)

WITNESS KELTON, another salesman formerly employed by defendant, testified (p. 96, Q. 11) that in selling Quin-Coco he told the druggists that it could be supplied when Coco-Quinine was called for or to supply the demand for Coco-Quinine; further (Q. 13) that in selling Quin-Coco he sold it with the idea that he was giving the retail druggist a larger profit, and (Q. 14) that Quin-Coco was re-sold

> "as it was bought—to replace Coco-Quinine, and that in almost every instance at my suggestion, and demonstration, it was bought for the purpose of replacing Coco-Quinine. Therefore, it was almost *in toto*, according to various letters and personal talks with druggists, sold as a substitute for Coco-Quinine."

Further (p. 100, XQ. 34) witness Kelton testified that he could never have sold any Quin-Coco "had it not been for the former birth of Coco-Quinine;" and further (XQ. 35) that "the color being the same" when a customer came in and called for Coco-Quinine the druggist could show him Quin-Coco and the customer would usually say "Yes, that is what I want;" and (p. 103, Qs. 47-48) that in order to have a pharmaceutical a good replacer for another "the color and flavor should be as near identical as possible."

WITNESS GROVES, another former salesman for defendant, testified (p. 359, Q. 12) that on calling on the druggist if he found that he was a user of Coco-Quinine

he used his best efforts to sell him Quin-Coco, pointing out that it was as good a product, cost him less money, and "could be dispensed on prescriptions and sold over the counter for Coco-Quinine;" and that he understood from Mr. Hagaman or Mr. H. Pfeiffer that Quin-Coco was an exact duplicate of Coco-Quinine (Q. 16) and they gave him to understand that it was a substitute for Coco-Quinine (Q. 17); that when he was traveling with Mr. Hagaman, they sold Quin-Coco (p. 367, Q. 85):

> "As a substitute for Coco-Quinine, telling the druggists that it was a similar product to Coco-Quinine in appearance and taste, containing the same amount of quinine as Coco-Quinine and much cheaper in price, one gallon costing $3.75 and Coco-Quinine would cost them in five pints $3.30."

Further, that they told the druggists that they could furnish Quin-Coco on calls for Coco-Quinine (Qs. 86-87); and (X-Q. 93) that he had heard Hagaman tell the druggists that Quin-Coco could be sold as Coco-Quinine and had heard Hagaman advise the druggists to buy Quin-Coco and substitute it on calls for Coco-Quinine (X-Q. 94); and (X-Qs. 96-98) that this was their only method of selling Quin-Coco, it being the only selling point they had.

Witness Hardy (p. 370, Q. 5), another former defendant salesman, testified that in offering Quin-Coco to the druggists he stated to them that:

> "It was the same thing in *color* and contents as Coco-Quinine with the exception that it flowed a little more freely, and that they could use it as a substitute for Coco-Quinine from the fact

that it contained both quinine and cocoa and the advantage they had in buying Quin-Coco was the cheapness of the price, cheaper than Coco-Quinine. I demonstrated to them also that it was the same color and I have had them to taste of it to see that it was the same taste."

He further testified that he had traveled with Mr. McNulty, one of defendant's sales-managers (Q. 9), and was instructed by him that he could say to the druggists that they would have a right to sell Quin-Coco on doctors' prescriptions for Coco-Quinine (p. 370, Q. 7).

He further testified that in demonstrating the similarity in color between Quin-Coco and Coco-Quinine, he would pour some of each on a piece of paper and again would let it drain out of the bottle, borrowing the druggist's bottle of Coco-Quinine for the purposes of comparison (Qs. 11-13); that Quin-Coco was not advertised, the doctors did not know of it, and in consequence they wrote no prescriptions for Quin-Coco, so it had to be sold as a substitute for Coco-Quinine (Q. 14).

WITNESS THURMAN, another former salesman of defendant concern, testified (p. 392, Q. 7) that they were taught by Mr. Garvin and the office managers and by circular letters to salesmen, etc., to push Quin-Coco as a substitute for Coco-Quinine, explaining that it was much cheaper in price; and (Q. 12) that they were instructed by the Company to tell the trade that Quin-Coco could be used and dispensed on calls for Coco-Quinine; and that it could be used on prescriptions for Coco-Quinine without knowledge of the physician or the patient; that he did not consider it hon-

est business but stated a salesman is compelled to follow the instructions of the house he represents if he remains in the employ of the house (p. 402, Qs. 74-78); that in his work in pushing Quin-Coco as stated, he was simply following the instructions of the house and if, as a salesman, he was dishonest, the house certainly was more dishonest in instructing him to do this (X-Q. 80); and that Mr. Henry Pfeiffer, president of the defendant concern, was out with him many times and gave him instructions in regard to pushing different preparations as substitutes and replacers (X-Q. 86).

Mr. Thurman explained (p. 405, EDQ. 114) that he testified very reluctantly and only after plaintiff had obtained permission from his employer that he might do so.

Enough testimony has already been reviewed to show beyond doubt that defendant's purpose in duplicating plaintiff's Coco-Quinine, particularly as to its non-essential physical characteristics, imparted to it chiefly by the use of chocolate as a coloring and flavoring medium, was to take from plaintiff and appropriate to itself a large part of the market for Coco-Quinine, which market had been created by plaintiff by great effort and expense by sending qualified and experienced men throughout the United States to visit the physicians, acquaint them with the merits of the preparation, and induce them to prescribe it for those ills for which it is indicated.

However, the record abounds in further evidence of the fact. Numerous retail druggists testified respecting the representations that were made to them by defendant's salesmen in an effort to induce them to purchase Quin-Coco. Many of these druggists did

not buy because they regarded it as an unethical or dishonest thing to pass off substitute preparations.

For example, witness Merithew (p. 60, Q. 7) testified that he did not accept Mr. Starring's proposition to purchase Quin-Coco for the reason that he "always tried to be ethical." Witness Soulier testified (p. 128, Q. 14) that he did not handle Quin-Coco "for the reason I considered it a substitute for Coco-Quinine." Witness Gravel (p. 130, Q. 11) testified that he did not handle Quin-Coco "because we have no demand for it and we consider it a substitute for Coco-Quinine." Witness Chestnutt (p. 148, Q. 12) testified that he did not buy Quin-Coco because "I did not care to substitute."

Other druggists yielded to the temptation held out to make larger profits, and bought the substitute Quin-Coco and passed it off on their physicians and their customers for Coco-Quinine as they were instructed they might do "without detection" or "without anyone being the wiser."

That the methods complained of were freely practiced cannot be doubted when such a multitude of witnesses testify to the same fact, and witnesses having no knowledge whatever of what others have testified to and no interest whatever in the case, and, in most instances, witnesses who from the nature of the conditions were very reluctant to testify at all. The witnesses, both druggisst and physicians, were located and doing business in various sections of the country, territory served by many different salesmen representing the defendant concern, yet the testimony was substantially to the same purport everywhere, showing a uniform method of approaching and persuading the druggist, thus indicating a single source of instruction and authority.

A few quotations selected at random from the testimony will be sufficient to show the arguments generally used by defendant's salesmen and the representations they made to the retail druggists.

WITNESS DUNHAM, a retail druggist of Indianapolis, Indiana, testified that the Warner salesman represented the defendant's product:

> "To be the same preparation as Coco-Quinine and no difference could be detected by the people and costs us less money than Coco-Quinine." (p. 28, Q. 7).

WITNESS PINK, a retail druggist of Indianapolis, Indiana, on the same subject testified:

> "They said that I could use it in the place of Coco-Quinine, that there was absolutely no difference and no one could tell the difference." (p. 30, Q. 3).

WITNESS MERITHEW, a retail druggist of Detroit, Michigan, (p. 60, Qs. 5-7) testified that defendant's salesman offered to sell him Quin-Coco stating that it could be dispensed as Coco-Quinine and when Coco-Quinine was called for, exhibiting a sample from his sample case and stating further that both in taste and physiological action and *appearance* it could not be distinguished from the original Coco-Quinine, and that it would be a good deal more economical in price.

Counsel for defendant, as in many other cases where the testimony of the witness was not to his liking, endeavored by a long series of cross-questions to confuse the witness, to obtain from him a statement which in itself might appear innocent and then ask the witness if that was not the substance of what the sales-

man stated to him. This witness after answering (p. 62, XQ 29) that the salesman told him that it was lower in price than Coco-Quinine and therefore the druggist would dispense it, was asked if this was the substance of what the salesman said, and he replied:

> "No, it is not. He spoke about the similarity of the preparations both in quantity of quinine contained in each ounce and in the physiological action *and appearance.*"

There could of course be no purpose in impressing upon the minds of the retail druggists that defendant's preparation was of the same "appearance" as plaintiff's preparation except to show the druggist that he might pass off defendant's product when plaintiff's product was called for, without detection.

Witness Knowles, a retail druggist of Saginaw, Michigan, on the same subject, testified (p. Qs. 8-11) that the salesman told him he was foolish for paying a higher price for Coco-Quinine when he could use defendant's product for dispensing purposes, and also to sell on call for Coco-Quinine or chocolate quinine or syrup quinine.

Witness Wolsey, a retail druggist of Cape Girardeau, Missouri, on the same subject testified (p. 77-78, Qs. 12-14) that defendant's salesman told him that he could sell Quin-Coco and make more money than in selling Coco-Quinine, that it was the same thing, and that he could dispense it as the same article and when Eli Lilly and Company's Coco-Quinine was called for.

Witness Kinder, a retail druggist of Cape Girardeau, testified (p. 81, Q. 8) that defendant's salesman on learning that he was using a large quantity of

Lilly's Coco-Quinine, sho
owed him defendant's prepar-
ation and told him he co
uld easily use it in the place
of Coco-Quinine and sa
ve considerable money, and
(Q. 12) that they were
identical preparations and
could not be distinguishe
d.

WITNESS SCOTT, a reta
il druggist of Memphis, Ten-
nesee, on the same subje
ct, testified (p. 114, Qs. 2-6)
that he had had experien
ce in a number of retail drug
stores, that at one of then
n defendant's salesman called
on him and stated that C
Quin-Coco could be dispensed
and sold as Coco-Quinine
e, Lilly, and that at another
the same salesman calle
d on him and stated that he
could put up and dispens
e Quin-Coco on specified pre-
scriptions for Lilly's Co
co-Quinine, giving as reasons
that it was the same thin
g as Coco-Quinine and much
cheaper.

WITNESS PROCHNOW, a
retail druggist of San An-
tonio, Texas, testified (p
p. 166-167, Qs. 12-19) that the
defendant's salesman re
presented Quin-Coco as the
same preparation as Co
co-Quinine and that he was
foolish for paying the p
price for Coco-Quinine, that
Quin-Coco could be used
on calls for Coco-Quinine or
on a prescription.

WITNESS PORTER, a reta
ail druggist of Henning, Ten-
nesee, on the same subje
ct testified (p. 174, XQ. 16)
that the defendant's sa
lesman told him Quin-Coco
was an identical prepar
ation with Coco-Quinine and
could be used and sold a
nd dispensed as such.

WITNESS BARNES, a reta
ail druggist of Macomb City,
Mississippi, on the same subject, testified (p. 180, Q.
10) that the defendant's salesman offered Quin-Coco
to him to be used as a sub
bstitute for Coco-Quinine and
said:

"That it was the
only preparation of chocolate

quinine on the market that could be dispensed for Coco-Quinine, without anyone being the wiser.".

This testimony was repeated on cross-examination in answer to XQ 29 (p. 182).

WITNESS HENO, a retail druggist of Napoleonville, Louisiana, testified (p. 202, Q. 12) that defendant's salesman represented Quin-Coco to him as a cheaper preparation than Coco-Quinine and (Q. 20) that they had been selling it all along for Coco-Quinine to be used as Coco-Quinine.

EDWIN R. ALBRIGHT, p. 236, a retail druggist of Mobile, Ala., testified that his store had handled plaintiff's product, Coco-Quinine, for about twelve years (Q. 3); that he did not know of any other syrup of quinine colored or flavored with chocolate before plaintiff's product was introduced; that he had quite a large sale for it, and that it is sold both on prescription and on call over the counter (Qs. 4-8); that they have never had a prescription or call for Quin-Coco (Qs. 9-10); that Quin-Coco had been offered to him by Mr. Jones, defendant's salesman, "as being same as Coco-Quinine" (Q. 12); that he understood Mr. Jones expected him to use it for Coco-Quinine (Qs. 16-17); *that the price was considerably lower than Coco-Quinine* (Q. 18); that where he was previously employed they sold Quin-Coco on demand for Coco-Quinine and on prescription for Coco-Quinine, and without advising the customers or physicians of the substitution (Qs. 19-21).

On cross-examination, defendant's counsel offered to make the witness show that customers in calling for Coco-Quinine referred to it by various other names, such as "chocolate quinine," etc., but while witness ad-

mitted they did have some calls in which the exact name, Coco-Quinine, was not used, yet they were not more than one-tenth of all their calls (Qs. 33-34).

Counsel for defendant also brought out in his cross-examination of this witness the fact that defendant's salesman, Jones, claimed that he was selling a lot of the substitute, Quin-Coco, "all over his territory" (Q. 50). He also made the witness admit that substituting Quin-Coco for Coco-Quinine was not the work of an honest druggist even if he did it himself (X-Q. 54). He also brought out by his presistent cross-examination the fact that Salesman *Jones always told the witness that it (Quin-Coco) was the same preparation as Coco-Quinine, and "that a customer could not tell the difference."* It is submitted that there could be but one purpose on the part of Salesman Jones in telling the witness that "customers couldn't tell the difference," and this purpose was to persuade the witness to substitute the defendant's product when plaintiff's product was called for.

Witness Samuel L. Hilton, of Washington, D. C., had testified (p. 1172, Q. 7) that a defendant's salesman had offered him Quin-Coco as a substitute for Coco-Quinine. Counsel for defendant asked witness to give salesman's exact words and the witness' reply at the time he was solicited to buy Quin-Coco referred to in his direct examination (p. 1183, X-Q. 48). He was then asked (X-Q. 49) if he could say positively that the "speech to the salesman" recited in the previous answer was the one made four or five years ago. The witness replied:

> "I have purposely eliminated a portion of what I used at that time, because I consider the language would not look well in testimony."

He then said that the salesman in presenting the sample said: "Here is Coco-Quinine; we have it perfectly" (Q. 50); also that he not only offered that substitute (Quin-Coco) but several other substitutes for other products so that, as the witness stated:

> "I almost came to the conclusion that he was offering a line of substitute products for well-known pharmaceutical specialties" (Q. 51).

The witness further stated (X-Q. 54) that he definitely understood that the salesman deliberately offered the preparation of Warner and Company as a substitute to be sold for Coco-Quinine.

JOHN F. WHITLEY, a retail druggist of Winfield, Louisiana, testified (p. 387, Q. 12) that the Warner salesman on noting that he had a considerable trade in Coco-Quinine, represented to him (Q. 13) that he had an identical preparation which he could "sell on the same prescriptions as we had been selling the Coco-Quinine;" that (Q. 14) he bought Quin-Coco on these representations, and (Q. 15) did dispense it as he had been dispensing Coco-Quinine on prescriptions and calls; that (Q. 16) the prescriptions were written for Coco-Quinine and when he dispensed it to customers he labeled the bottles Coco-Quinine (Qs. 16-18).

Other testimony to substantially the same purport was given by other witnesses among whom are the following:

Martin, p. 55, Q. 4.
Merithew, p. 62, X-Q. 29.
Knowles, p. 67, X-Q. 28.
Wright, p. 68, Qs. 10 and 12.
Wolsey, pp. 77-78, Qs. 12-13.
Kinder, p. 81, Q. 8.

Henckell, pp. 87-88, Qs. 11-17.
Kelton, p. 95, Q. 7.
Blodau, pp. 106-107, Qs. 4-7.
Manning, p. 110, Q. 10.
Scott, p. 114, Q. 6; p. 115, X-Q. 16.
Richard, p. 143, Q. 6; p. 145, X-Q. 19.
Prochnow, p. 166, Qs. 12-13.
Ray, p. 210, Q. 7; p. 211, Q. 10.
Ray, p. 212, X-Q. 33.
Ames, p. 218, Qs. 10-12.
McMillan, p. 244, Q. 5; p. 246, X-Q. 33.
Vaughan, p. 254, Qs. 9-12.
Reid, p. 273, Qs. 12-17.
Mosley, p. 277, Q. 16.
Jolly, pp. 292-294, X-Qs. 76-83-84.
Garber, p. 330, Q. 18.
Lindsay, p. 333, Q. 17; p. 334, X-Q. 18.
Nelligan, p. 348, Q. 16.
Groves, p. 359, Q. 12.
Hardy, p. 370, Q. 5.
Garner, p. 378, Q. 9-10.
Noiret, pp. 407-408, Qs. 7 and 12.
Kuhn, pp. 521-22, Q. 28, X-Q. 36.
Blodau, p. 524, Q. 4.
White, p. 531, Qs. 5 and 532, Q. 9.
Walker, p. 541, Q. 5.
Culver, p. 549, Q. 4; p. 550, Qs. 8 and 9.
Stuckey, pp. 558-59, Qs. 7-11.
Moise, p. 643, Q. 14.
White, pp. 650-651, Qs. 5-9.
Sinclair, p. 680, Qs. 3-4.
Powell, pp. 682-683, Qs. 5-13.
Lavison, p. 690, Q. 4.
Lavison, p. 695, X-Qs. 32-34. (H. P.)
Lavison, p. 698, X-Qs. 64-65.
Herin, pp. 731-732, Qs. 4-11.
McCorkle, p. 919, Q. 2.
McCorkle, p. 924, Q. 47.
James, pp. 925-26, Qs. 2 and 3.

By the testimony of these witnesses it is shown that the representations of defendant's salesmen in soliciting orders for QUIN-COCO, after comparing defendant's product with plaintiff's COCO-QUININE, were made by statements substantially such as these:

Absolutely no difference.

No one can tell the difference.

Can be dispensed as Coco-Quinine when Coco-Quinine is called for.

In appearance it can not be distinguished from the original Coco-Quinine. More economical in price.

Cheaper than Coco-Quinine and can be used for dispensing on calls for Coco-Quinine.

Same as Coco-Quinine, and cheaper.

The same thing as "Lilly's Coco-Quinine, and cheaper in price."

A preparation that can easily be used in the place of Coco-Quinine, and saves considerable money.

That Quin-Coco was a good substitute for Coco-Quinine at quite a saving in price.

That Quin-Coco is a product identical with the Lilly product, and much cheaper.

Same thing as Coco-Quinine Lilly, also much cheaper.

Can be used to supply the demand for Coco-Quinine, but a much cheaper preparation.

Can be dispensed for Lilly's Coco-Quinine without detection.

Can be dispensed for Coco-Quinine without anyone being the wiser.

That Quin-Coco can be dispensed on a call or on a prescription for Coco-Quinine, and much cheaper.

Identical in color and in taste with Coco-Quinine, and no one can tell the difference.

It is the only preparation of chocolate quinine

on the market that can be dispensed for Coco-Quinine without anyone being the wiser; besides, it is cheaper.

While the expressio s vary somewhat insofar as the actual words are concerned, yet in substance they are practically the same; the burden of the salesmen's song being that Quin-Coco is not distinguishable from Coco-Quinine in physical appearance, and therefore it can be sold when a customer calls for Coco-Quinine,or on physicians' prescriptions calling for Coco-Quinine, without detection; and the lure dangled in front of the eyes of the retailer is the cheaper price and the opportunity for larger gain.

It should be borne in mind that the retail druggists who testified, are in no instance, in any way connected with plaintiff or financially interested in the outcome of this litigation.

It should also be borne in mind that these witnesses were selected from a wide range of territory covering a large portion of the country; and the territory served by a large number of defendant's salesmen, in order to show that the practices followed were general throughout the country and throughout the entire body of defendant's salesmen and not peculiar to any particular individual or any particular locality. This testimony shows the general policy of the defendant company for which its general officers alone can be responsible.

This evidence clearly justifies the conclusions of the Court of Appeals that the practice complained of is "fully established by the evidence of an unusual number of witnesses."

That these methods were successful in building up a large trade in defendant's substitute product Quin-Coco and consequently, in depriving plaintiff of the business of supplying the demand for Coco-Quinine which it had created by its own effort and at its own expense, is shown by the testimony of a large number of witnesses, among which are the following:

Kelton, p. 97, Q. 14.
Grigsby, p. 150, Q. 9.
Griffin, p. 164, Q. 11.
Burnes, p. 170, Q. 11.
Porter, p. 177, X-Q. 45.
Fly, p. 226, Q. 10.
Tisdale, p. 249, Q. 8.
Faucher, p. 266, Qs. 7 and 8.
Vinson, p. 297, Qs. 3-4.
Bell, pp. 311-312, Qs. 3-4.
Wetzel, p. 336, Qs. 4-7.

As to the extensive sales of Quin-Coco by defendant note particularly the testimony of the former defendant's salesman Kelton (pp. 565-586) including the table printed on pp. 568-583, showing the witness' duplicates of actual orders for Quin-Coco sent into his house during the periods stated, with the explanation that these duplicate orders as thus listed were not complete as many of his duplicates had been misplaced and were not available, those listed being only such as he was able to find among his own papers after the lapse of several years between the date of his service for defendant and the date he was testifying.

Please note also the answer by witness Kelton to Q. 13 (pp. 587-588) showing that the St. Louis Laborato-

ries on December 23, 1909, were manufacturing one hundred and sixty (160) gallons per week of Quin-Coco. It is thought not unfair to assume that the Philadelphia laboratories were manufacturing fully as much.

Witness Kelton.

Defendant sought to put of record certain matters relating to Mr. Kelton for the purpose of discrediting his testimony. The only thing that developed was that Mr. Kelton had some trouble about a woman in Memphis, Tennessee, and it is intimated that he also was drinking. For these reasons was discharged. While he may have had a weakness for wine and women there is not the slightest suggestion anywhere by anyone that Mr. Kelton was not reliable and a good salesman. In fact, there is much in evidence to show that Kelton was considered one of the best and most efficient salesmen in defendant's employ. The correspondence between Kelton and Mr. Henry Pfeiffer, and Mr. G. A. Pfeiffer and Mr. G. D. Merner, the officers and owners of the controlling interest in the defendant concern, shows that Mr. Kelton had the confidence as well as the friendship of each of these gentlemen and that his ability as a salesman was appreciated.

The letters from the defendant house to Mr. Kelton signed frequently by H. Pfeiffer, president, sometimes by G. A. Pfeiffer, and sometimes by G. D. Merner, treasurer, and printed on pp. 586-626, show clearly the close relationship between Mr. Kelton and his superiors, the officers of the defendant company, and the appreciation by the company of Mr. Kelton's efforts in pushing the sales of Quin-Coco.

In defendant's letter to Kelton signed by Mr. H. Pfeiffer, dated November 29, 1909 (printed on pp. 586-587) it will be seen that Mr. Pfeiffer was very much pleased "to note the nice business you are doing in Quin-Coco. It only proves that a good article in the hands of a salesman can be sold and will repeat, and the more of them you can get started the larger your orders will become and under our contract with you you will reap the benefit with us because every dollar's extra business means a commission to you."

In the letter from G. A. Pfeiffer (printed on pp. 589-590) it will be noted that "Friend Kelton" was commended for "taking care of Memphis" and assured that he could not please his house better than to give his "competitor a black eye."

William C. Dirmeyer and Solomon R. Hamilton, both of Memphis, Tennessee, and well known as among retail druggists of high standing in that city, both testified (pp. 546-547) that they had known Mr. Kelton for a long time and that his reputation was good, and that he is a man whose word is entitled to be believed.

HOW PLAINTIFF CREATED THE DEMAND.

"DETAIL WORK."

The methods employed by plaintiff in creating a demand for its products is known in the trade as "detail" work. It employs a large number of salesmen—in 1916 from 150 to 160 (testimony of General Manager Lynn, p. 876, X-Q. 48)—and these men are, as a rule, either graduate physicians or graduate pharmacists, their business being to call upon the physician with samples of plaintiff's preparations and "detail" to the physician the preparation, explaining to him its formula, the purposes for which it is in-

tended, and endeavor to enlist his interest to the extent of prescribing the preparation where, in his practice, it may be indicated. The salesman then calls upon the retail druggists and takes their orders for such Lilly products as they may need and these orders are turned in to the jobbing house supplying that particular retail trade. All of plaintiff's products are sold through the jobbers. The house has no direct financial transactions with retailers or physicians.

The importance of detail work is explained by Mr. Lynn (p. 870, Q. 18). In this question he was asked his view of the importance of detail work in the pharmaceutical manufacturing business. He replied:

> "What we call 'detail' work is absolutely essential to the successful exploitation in a large way of any pharmaceutical specialty, and it is frequently essential, as well, in the introduction of general line items under certain conditions. We are doing more and more detail work all the time. Not only are we employing now a number of special detail men who devote all of their time to this sort of work and have plans for increasing the number of such special men, but we are demanding more and more detail work from our regular force of salesmen whose chief business, however, is to visit the trade."

He explained further (Q. 19) that plaintiff's salesmen are, as a rule, what may be termed "combination" men, qualified for both detail work and salesmanship.

JAMES E. BARTLETT, a witness for plaintiff, assistant secretary and treasurer of Parke-Davis & Co., and in charge of the sales department of that concern, was



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asked (p. 742, Q. 2) to explain what is meant by the expression "detail" work. He replied:

> "By 'detail' work we understand the method by which we introduce our specialties with physicians, dentists, veterinarians, hospitals, etc., through the personal solicitation of employees whom we style 'detail' men."

He testified (Q. 3) that his house considered this class of work "indispensable" and (Q. 4) that they were constantly increasing the amount of detail work being done and the number of men employed for that character of work; and stated further (Q. 6) that he believed all the leading pharmaceutical houses employed detail work to a greater or less extent.

It is abundantly proved by the testimony that detail work is the chief method employed by plaintiff for introducing its specialties and pharmaceuticals to the medical profession. It is an expensive method but, as will be readily understood, is the only method by which a manufacturer can create a demand for his medicines and pharmaceuticals intended for use in ethical practice, for unless the physician who prescribes is made acquainted with the therapeutic value and medicinal use of the medicines and pharmaceuticals, it can not be expected that he will prescribe them.

It is such work that was referred to by Mr. J. K. Lilly, president of the plaintiff concern, when he said (p. 42, Q. 2) that after they had devised the formula, and adopted chocolate or coco as the medium for giving to the preparation "a characteristic color and flavor so that it would be different from anything that had been previously used" that "*depending on the characteristic color and flavor and the distinctive*

name, we expended considerable sums upon promoting its sales until it became one of our most important specialties."

The demand for the product was created as a result of this work and these large expenditures by plaintiff. It is this demand which defendant by its substitute product Quin-Coco sought to supply and which to a large extent it succeeded in supplying (until stopped by the Court of Appeals), thereby appropriating to itself the fruits and benefits flowing from plaintiff's labors and expenditures with corresponding damage to plaintiff.

Plaintiff's salesmen in testifying told that it was a part of their work to call upon the prescribing physician and "detail" to him plaintiff's preparations.

For example, see the testimony of the following witnesses:

Hooper, pp. 20-21, X-Qs. 40-43.
Martin, p. 54, Q. 2.
Messenger, p. 90, Q. 4.
Winchester, p. 112, Q. 5.
Fly, p. 224, Q. 3.
Tisdale, p. 248, Q. 1.
Wetzel, p. 335, Qs. 2-3.
King, p. 503, Q. 95.

DEFENDANT NEVER CREATED A MARKET FOR QUIN-COCO

DID NOT DO "DETAIL" WORK.

That defendant's efforts were directed more toward supplying a demand created by others than to creating any demand of its own for its products is shown by the testimony of Mr. G. A. Pfeiffer himself, the treasurer and general manager of the defendant con-

cern. In his direct examination (p. 1200, Qs. 57-60) he testified that at that time defendant was employing 75 to 80 travelers visiting the retail drug trade and dispensing doctors; that they distribute literature to customers through the mails and sample their products in response to requests from the trade; and that they do not advertise in the drug trade journals nor in the newspapers. On cross-examination (p. 1229, X-Qs. 239-241) the witness testified that the detailing of specialties on their part depended upon the traveler, the traveler very largely using his own judgment, saying further:

> "It is only done in his spare time and we feel that he is the best judge of his territory, and the work so done is entirely voluntary on his part. It is not a requirement from the firm."

The witness further testified (p. 1233, X-Q. 283) that formerly "detailing" was considered the only method of introducing new specialties and that it is an efficient method of introducing a new product, and;

> "However, the expense of personal detailing is so high as to, in many cases, make it unprofitable."

In regard to advertising, the witness testified (p. 1230, X-Q. 254) that formerly the house advertised quite largely in the medical journals but the advertising was discontinued because they thought it did not pay.

Further (p. 1232, X-Q. 272) he stated:

> "Not spending any money in advertising in the medical journals it is not necessary to add this to our selling cost."

Without this expense it is easy to see how defendant can undersell plaintiff and probably make even a larger profits on its sales.

EUGENE R. BROWN, one of defendant's salesman, testifying as a witness for defendant (pp. 1404-5, Q. 15) stated that he told Mr. Kinder that "we did not detail the doctors on Quin-Coco" and * * * "I said we do not detail products."

The witness testified further (p. 1409, X-Q. 53):

> "Our house has instructed their salesmen not to detail a physician; that is a loss of time and an expensive proposition and I do not detail a doctor, except when I am in a town and there is no train out and nothing else to do, I might go around to his office and loaf with him and talk about the merits of our products, but I never lose any time in doing it."

This testimony was given with his employer in the room while he was testifying and was evidently intended to emphasize the policy of the house and excuse his admission that he ever did talk to a doctor about their products by saying that he did not "lose any time in doing it."

It is clear that defendant never attempted to create a market for its preparation Quin-Coco either on its merits or under its name. This is shown by the testimony of a multitude of druggist witnesses to the effect that no prescriptions written for Quin-Coco and no calls for Quin-Coco were ever received in their stores. This testimony is uniformly the same from druggists in all of the territory covered, which included a very large part of the territory in the United

States where malaria is prevalent and the use of quinine extensive.

In each city visited, the leading prescription druggists of the town were called to testify on this point in order to show that defendant had never created a demand for Quin-Coco, but in its sales of Quin-Coco was utilizing the market created by plaintiff's efforts and at plaintiff's expense and selling its product merely as a substitute for plaintiff's product and to be dispensed in response to calls and prescriptions for plaintiff's product.

In two or three instances, jobbers testified that they had received one or two calls for Quin-Coco from a retailer and in such instances had obtained the product from defendant and furnished it to the retailer. In nearly all instances, however, the jobbers testified as did the retailers, that no calls for Quin-Coco were ever received at their stores. It is easy to understand how a jobber would occasionally receive an order for Quin-Coco from some retail druggist customer who had been induced by defendant to stock Quin-Coco and substitute it for Coco-Quinine and who by such practice was making a larger profit than he could by handling plaintiff's product. Should he need a new supply before the defendant salesman's next call he would naturally phone his jobber for it.

As indicating the absolute absence of any demand for Quin-Coco as such, the testimony of druggists in all sections that no calls or prescriptions for Quin-Coco were ever received at their stores may be referred to as follows:

Hooper, p. 21, X-Qs. 45-46.
Dunham, p. 29, Q. 13.
Pink, p. 30, Qs. 5-6.

Wilson, p. 42, Qs. 5-7.
Roman, p. 54, Q. 6.
Merithew, p. 61, Qs. 5-10.
Knowles, p. 65, Qs. 6-7.
Wright, p. 68, Qs. 7-8.
Kinder, p. 82, Qs. 10-11.
Schuh, p. 86, Qs. 11-12.
Jennings, p. 93, Qs. 9-15.
Sand, p. 102, Qs. 2-3.
Sand, p. 104, Qs. 10-11.
Blodau, p. 107, Qs. 10-11.
Manning, p. 109, Qs. 4-5.
Scott, p. 144, Qs. 8-9.
Bond, p. 122, Qs. 6-8.
Bordeaux, p. 123, Q. 11.
Bracy, p. 124, Qs. 7-11.
Bolden, p. 126, Qs. 5-6.
Havenor (Jobber), p. 73, Qs. 8-9.
Van Schaak (Jobber), p. 74, Q. 6.
Schuh (Jobber), p. 86, Q. 8.
Koellein (Jobber), p. 105, Qs. 7-8.
Bond (Jobber), p. 122, Qs. 6-8.
Soulier (Jobber), p. 128, Qs. 5-12.
Gravel (Jobber), p. 130, Q. 9.
Bowden (Jobber), p. 138, Q. 9.
Foster, p. 152, Q. 9.
Gilmer (Jobber), p. 161, Q. 8.
Lyons (Jobber), p. 191, Qs. 9-10.
Fitch (Jobber), p. 193, Q. 11.
Persell (Jobber), p. 194, Qs. 6-7.
Chestnutt, p. 148, Qs. 10-11.
Grigsby, p. 150, Q. 8.
Foster, p. 152, Qs. 7-8.
Schaefer, p. 157, Qs. 26-27.
Prochnow, p. 166, Q. 11.
Porter, p. 172, Q. 7.
Barnes, p. 180, Qs. 8-9.
Samson, p. 187, Qs. 10-12.
Heno, p. 202, Qs. 10-11.
Walsdorf, p. 206, Qs. 2-7.

F. I. Ames, p. 217, Qs. 5-6.
W. S. Ames, p. 218, Qs. 7-9.
Colvin (Jobber), p. 236, 5.
Albright, p. 237, Qs. 9-10.
Adams, p. 243, Qs. 2-7.
Shepherd, p. 247, Qs. 6 and 7.
Daly, p. 256, Qs. 5 and 6.
Barber, p. 260, Q. 10.
Northington, p. 264, Q. 8.
Greil, p. 267, Q. 7.
Reid, p. 272, Qs. 8 and 9.
Moseley, p. 277, Qs. 12 and 13.
Cunningham, p. 283, Qs. 8 and 9.
Moore, p. 284, Qs. 10 and 11.
Jolly, p. 286, Qs. 11 and 12.
Greene, p. 296, Qs. 9 and 10.
Coleman, p. 299, Qs. 17 and 19.
Franklin, p. 304, Qs. 2-3 and 10.
Marshall, p. 306, Qs. 8 and 10-13.
Ridenour, p. 319, Qs. 2-3.
Fort (Jobber), pp. 308-309, Qs. 6 and 7.
Ridenour, p. 320, Qs. 9 and 14 and X-Q. 15.
Burton, p. 322, Qs. 14 and 15.
Burton, p. 323, RDQs. 26 and 28.
Cavedo, p. 326, Qs. 4-7 and 10.
Garber, p. 330, Qs. 9 and 10.
Lindsay, p. 332, Qs. 6-8.
Allen, p. 342, Qs. 6 and 7-8.
Nelligar, p. 347, Qs. 2-3.
Arrington, p. 349, Q. 2.
Arrington, p. 350, Qs. 11 and 12.
Whilley, p. 387, Qs. 8 and 9.
Greene, p. 507, Qs. 15 and 16.
Blodau, p. 524, Q. 4.
White p. 533, Qs. 17 and 18.
White p. 537, X-Qs. 49 and 50.
Walker, p. 542, Q. 11.
White, pp. 650-51, Qs. 7 and 8.
Seegar, p. 669, Q. 26.
Sinclair, p. 680, Q. 5.

Lavison, p. 693, Qs. 17 and 18.
Heim, p. 731, Qs. 6 and 7.
Ashton, p. 790, Qs. 4-5.

It is not conceivable, had defendant expended any effort in creating an independent market for Quin-Coco, that some of the druggists here named would not at one time or another, have received a call or a prescription for it. Many of the druggists examined were from the leading prescription stores of the town or city where located and recognized as leading pharmacists receiving prescriptions from physicians in all the surrounding territory. Under such circumstances it is not possible to reach any other conclusion than that Quin-Coco was supplied by defendant to the retail druggists who would buy it not for the purpose of supplying any demand for Quin-Coco but for the purpose of supplying the demand for Coco-Quinine, which demand had been created solely by the efforts and at the expense of plaintiff.

(h) *Some Instances of Actual Substitution Shown by the Proofs.*

Witness Hooper (pp. 16-17, Qs. 7-9) testified that he was behind a prescription case in a drug store in Hillsboro and saw Mr. Paine, the druggist, fill a prescription written for Coco-Quinine with Quin-Coco.

Witness Martin (p. 55, Q. 4 and p. 56, Q. 7) testified that he was behind the prescription case in a drug store when a person handed in a slip of paper calling for Coco-Quinine and the prescription clerk filled the order for Coco-Quinine with Quin-Coco.

Witness Wright (p. 69, Qs. 15-17) testified that he had sold Quin-Coco when Coco-Quinine was called for

in his drug store and that defendant's representative had told him he could sell it the same as Coco-Quinine and that there was no distinction.

WITNESS KESSEL (p. 70, Qs. 3-4) confirmed the testimony of Mr. Martin above referred to.

WITNESS MESSENGER (pp. 90-91, Qs. 4-5) testified that he knew it to be a fact that the druggists in his territory carried Quin-Coco as a substitute for Coco-Quinine and that they used it on the prescriptions where the physicians had written for Coco-Quinine.

WITNESS BROUSSARD testified (pp. 134-135, Qs. 8-10) that he had seen prescriptions calling for Coco-Quinine filled with Quin-Coco.

WITNESS BOWDEN testified (p. 138, Q. 10) that he usually supplied Quin-Coco on calls for Coco-Quinine.

On cross-examination counsel for defendant attempted to obtain from the witness a modification of this statement by having the witness admit that such practice was dishonest and to explain how Quin-Coco might be sold on calls for Coco-Quinine in a legitimate manner. In respect to whether or not the transaction was an honest one, the witness answered (p. 139, XQ. 12):

> "Why, I consider that just as honest as the man who sold it to me."

Being further pressed in respect to the matter (XQ. 13) the witness replied:

> "I consider neither of those transactions honest."

Not being satisfied, counsel for defendant, again

appealing to the witness' pride and natural desire to appear honest, asked:

"XQ. 14. Then, if you don't consider the transaction honest, I shall assume that the transaction you refer to of supplying Quin-Coco 'usually on a call for Coco-Quinine' has not been done by you in any dishonest or unfair way. Am I correct?

A. No, you are wrong. I simply supplied it because I got a better price on it and dispensed it to save a little money. The preparation called for was Coco-Quinine and I should have dispensed Coco-Quinine.

XQ. 15. And you say that was not an act of an honest druggist do you?

A. I must say that.

XQ. 16. Did you give the customer in such cases any understanding at all of what he was getting?

A. I gave him to understand by implication that he was getting Coco-Quinine. In fact, *it was labeled Coco-Quinine.*"

WITNESS RICHARD, who had testified as to representations made to him by the defendant salesman and to the fact that Quin-Coco and Coco-Quinine were similar and that he was told that Quin-Coco could be used to supply the demand for Coco-Quinine, was taken in hand by counsel for defendant and made to testify in respect to his standard of honesty and was then asked (p. 144, XQ. 18):

"Have you dishonestly passed off Quin-Coco for Coco-Quinine with the effect of deceiving the customer?

A. I have sold Quin-Coco when Coco-Quinine was called for not with the intention to defraud the customer but believing I was giving him as good a preparation as he asked for, *which, of course, was wrong.*"

WITNESS SCHAEFER (p. 156, Qs. 14-17) testified that he had dispensed Quin-Coco in response to prescriptions written for Coco-Quinine and (p. 160, Rdq. 65) that he did not inform the physician or the customer or obtain their consent to the substitution.

In Houston, Texas, Witness Schuler, (p. 162) and Witness Griffin (p. 162) testified to circumstances that showed conclusively that Quin-Coco was being sold at the Hardy Street drug store, 2102 Hardy street, Houston, on calls for Coco-Quinine, Witness Schuler testifying and identifying a sample which he bought at that store labeled Coco-Quinine and Witness Griffin testifying that there was no Coco-Quinine in the Hardy street drug store and that there had not been for two years, while, on the other hand, there were large quantities of Quin-Coco in the Hardy Street drug store stock.

WITNESS HENO (p. 202, Qs. 12-15) testified that he bought Quin-Coco and supplied it on prescriptions written for Coco-Quinine, as advised by the representative of defendant and with disastrous results to be hereafter referred to.

It is not necessary to refer in detail to further testimony of individual witnesses on this subject. Attention, however, is called to the following instances of actual substitution, in line with practices suggested by salesmen for defendant:

Stovall, p. 233, Qs. 4-8.
Albright, pp. 237-238, Qs. 19-20.
Albright, p. 241, Xqs. 53-54.
Shepherd, p. 247, Q. 4.
Daly, p. 256-257, Qs. 5-17.
Reid, pp. 273-274, Qs. 16-21.
Bell, pp. 312-313, Qs. 5-10.
Garber, p. 330, Qs. 16-17.

Lindsay, pp. 334-335, Qs. 22-24.
Hardy, p. 371, Qs. 16-18.
Garner, pp. 378-379, Qs. 12-16.
Turner, pp. 384-385, Qs. 4-12.
Whitley, pp. 387-388, Qs. 15-19.
White, pp. 532-33, Qs. 10-12.
Walker, p. 543, X-Q. 26.
Stuckey, pp. 560-61, Qs. 15-19.
Dr. H. H. Brown, p. 670. (stipulation)
Burns, p. 671, Q. 2.
Powell, pp. 682, Qs. 7-9.
(Warner furnished Q. C. on orders sent in for C. Q. p. 686-687.)
Lavison p. 693, Q. 19.
Kessel, pp. 735-6, Qs. 6-9.

It is urged on behalf of defendant that out of the fifty-odd thousand retail druggists in the United States only a comparatively few have been shown to have practiced "passing off" defendant's product when plaintiff's product was called for or prescribed and that the retail druggist is really responsible for this rather than defendant. This point is not entitled to much consideration. The evidence clearly shows that a comparatively large number of druggists in different localities were practicing the fraud as suggested by defendant's salesmen. This is sufficient to justify the presumption that the practice was general in the drug trade and, in fact, it had become a habit with the retailers accustomed to purchase defendant's product. This must have been so because of the large sales of defendant's product, clearly established, and the absolute absence of any market for it on its own merits and under its own name, as shown by the testimony of the numerous druggists testifying that they never had a call or a prescription for Quin-Coco.

(i) *Defendant's Product Inferior.*

WITNESS MESSENGER (p. 90, Q. 4) testified that doctors in his territory had stated to him that in using the substitute for Coco-Quinine, it had caused the patient to become nauseated and for this reason, they had fallen out with Coco-Quinine, but that when the fact was brought to their attention that they were not obtaining Coco-Quinine and they obtained the original Coco-Quinine, the result was satisfactory, stating:

> "I know it to be a fact that this substitution has caused the original article of Eli Lilly and Company, Coco-Quinine, a great loss in favor with the physicians."

It is true that this witness did not identify defendant's product Quin-Coco as the substitute used by the physicians referred to in his testimony, but the testimony is important as showing the tendency of such substitution as practised by this defendant to destroy the valuable good-will built up by plaintiff by great effort and at great cost.

WITNESS HENO (p. 202, Qs. 12-15) testified that he bought a gallon of Quin-Coco from defendant's representative, supplied it in response to prescriptions written for Coco-Quinine, and that after he had used a portion of the gallon he was stopped by one of his physicians because he was not obtaining the required or anticipated results, the physician complaining that he did not understand what was the matter with his Coco-Quinine. He (the witness) then explained to the doctor that he was using Quin-Coco, when the physician ordered him to discontinue such use and to buy Eli Lilly and Company's Coco-Quinine.

Witness Reid (p. 276, RDQ. 43) testified that he had furnished Quin-Coco in place of Coco-Quinine and that a customer came back complaining that it had no effect. He then explained the difference, when the customer secured Coco-Quinine and it proved satisfactory. The witness then changed his opinion as to his belief that the two preparations were the same.

Witness Garner testified (p. 379, Qs. 15-16) that he bought defendant's Quin-Coco and dispensed it on calls over the counter and on prescriptions, labeling it "Coco-Quinine;" and that Dr. H. H. Browne complained of the results.

Witness Turner, the prescription clerk in Mr. Garner's drug store, testifying in respect to the complaint of Dr. Browne (p. 384, Q. 4) stated that he had used Quin-Coco on Dr. Browne's prescription for Coco-Quinine, Lilly; that (Q. 6) Dr. Browne claimed that the Coco-Quinine he prescribed did not give satisfaction; that the babies could not retain it on their stomachs, and that Lilly was evidently doing business on his past reputation, and that he was going to have to give up using it.

The witness further testified that Dr. Browne did quit prescribing Coco-Quinine; that he had never made any complaint about results prior to the time he was given Quin-Coco on his prescriptions for Coco-Quinine (Q. 9) but after he began using Quin-Coco, then Dr. Browne complained about the results several times.

The facts related by Turner were confirmed by a stipulated statement by Dr. Brown printed on pp. 670-671.

Witness Whitley testified (p. 388, Qs. 19-21) that he furnished Quin-Coco, dispensing it as Coco-Quinine,

and that it was returned by his customers as not satisfactory.

Witness White (p. 538, X-Q. 58) testified of a case where Quin-Coco did not give satisfaction and Mr. Whitley said he wanted to take it up with the house and obtain credit for the bottle or have it replaced with a new bottle.

Witness Stuckey (pp. 560-561, Qs. 18-19) testified that he bought one gallon of Quin-Coco, that it was not satisfactory, that he used part of it, but did not use the rest, because his doctors prescribed Coco-Quinine and told him that he could not use this preparation, Quin-Coco, because it was not Coco-Quinine.

The testimony on this subject is sufficient to establish the allegation that defendant's product was at least not uniformly of a quality equal to plaintiff's and that in many instances it failed to give satisfaction where, before its use, plaintiff's product had given entire satisfaction, thus resulting in inevitable injury to plaintiff's business good-will.

(j) *Defendant Responsible for Its Sales Policy and Practices.*

It is boldly claimed on behalf of defendant that it has a perfect right to market its product Quin-Coco by the methods employed; that its customer is the retail druggist; that the retail druggist is not deceived but knows what he is buying and that if any fraud or crime is committed, it is the fraud or crime of the retailer, as it is the retailer who is guilty of the "passing off," or substitution, of defendant's product Quin-Coco when plaintiff's product Coco-Quinine is called for or prescribed.

The District Court substantially agreed with this contention but the Court of Appeals on this point said:

> "The evident purpose in each case was to deceive, not the retail dealer, but the ultimate consumer. For the consumer in this case the preparation was rebottled. To him it came, not in the distinctive dress in which it reached the retail dealer, but naked. The only mark it had was that of color, which (as in the Coco-Cola case) the defendant labored to make non-distinctive. Having counseled fraud upon the ultimate consumer and having put in the hands of the retail dealer the means of committing the fraud, there is no room for the defendant to shift the blame to the retail dealer and no ground for the defendant to say that it is not answerable for the part which it itself played in the deception of the consumer. Certainly the defendant was an accomplice, if not the principal, in the practice."

It is submitted that the conclusion reached by the Court of Appeals on this point is sound and supported not only by the authorities cited in the decision, but by a long line of other authorities and by all rules of equity and justice.

It has already been shown by the testimony of witnesses Kelton, Groves, Hardy, and Thurman, former salesmen employed by defendant, that they not only followed the practices complained of by plaintiff in their efforts to sell Quin-Coco, but they did so by direct instructions and authority of the defendant's officials and sales managers.

That the methods complained of were generally followed by all of the salesmen employed by defendant is shown by the testimony of numerous druggists, doing business in many different and widely separated

localities, which has been heretofore reviewed. This testimony proves beyond question that the general practice in defendant's entire sales organization was to push the sale of Quin-Coco as a substitute for plaintiff's Coco-Quinine, representing to the retail druggist that he could save $1.30 a gallon (or the difference between the price of defendant's product and the price of plaintiff's product, whatever it might be) by buying defendant's Quin-Coco and dispensing it on the calls and prescriptions for plaintiff's Coco-Quinine, assuring the druggist that Quin-Coco was such a perfect imitation of Coco-Quinine, not only in medicinal character *but in color and flavor*, that the substitution could never be detected, either by the physician or the customer, and no one would be the wiser. In many instances doubts in the minds of the retail druggist as to the correctness of the latter assurances were dispelled by making comparisons of the two preparations, by pouring a little of each on a piece of white paper or into a glass graduate for comparison as to color and tasting for comparison as to flavor.

Defendant attempted to deny these proofs by calling as witnesses its identical salesmen who were accused. As before called to attention these men had been instructed (O'Connell letter No. 4) as to the testimony desired by their employer. Each of such witnesses was made to profess approval of ethical standards and practices in the sale of products. Each salesmanager was then asked a question like this:

> "Have you ever authorized or suggested to one of your traveling salesmen that he should or might suggest to retail druggists that they could sell Quin-Coco, S & H on prescriptions of doctors

> or over the counter when Coco-Quinine, Lilly, was specifically called for?"

This question was put to sales manager Hagaman (p. 1278, Q. 21) and he answered "No."

The form of question put to the salesmen was substantially as follows:

> "State whether or not you ever suggested to a retail druggist that he could buy Quin-Coco S & H and sell it on prescription or over the counter when Coco-Quinine, Lilly, was specifically written or called for over the counter."

This question was put to Salesman Gonzales (p. 1360, Q. 41) and the witness answered:

"I did not."

It should be noted that these witnesses, defendant's salesmen, besides having the instructions contained in the general letter, O'Connell Letter No. 4, before testifying, had been called in to the home office at St. Louis or the home office in Philadelphia and had ample opportunity to be instructed respecting the testimony of plaintiff's witnesses they were expected to dispute and to be made acquainted with the character of answers they were expected to give.

The questions were put in a form so that the witness could answer perhaps without doing violence to his conscience, for the question and answer combined, while seemingly denying the statements of plaintiff's witnesses, nevertheless were rather poor attempts to conceal the truth. The questions asked if they advised using "Quin-Coco S & H" when "Coco-Quinine, Lilly," was "specifically" written or called for.

It is doubtful if defendant's salesmen ever referred to the product by the name "Quin-Coco S & H" and it

is a well known fact that plaintiff's product was called for and prescribed more generally by its trade name "Coco-Quinine" than by said trade name followed by the maker's name "Lilly."

The same character of questions above indicated were asked of practically all of the salesmen implicated by plaintiff's witnesses and also of the officials of the defendant concern and negative answers obtained.

In every instance where a defendant salesman was implicated, plaintiff has produced testimony showing the fact by two or more disinterested witnesses having no connection, near or remote, with the plaintiff concern and usually testifying most reluctantly.

Defendant's salesman Jones was implicated by plaintiff's witnesses:

Richard, p. 145, X-Q. 19.
Persell, p. 195, Q. 10.
Heno, p. 202, Qs. 12-13.
W. S. Ames, p. 218, Q. 11.
Stovall, p. 234, Qs. 11-12.
Mayfield, p. 234, Q. 3.
Albright, p. 237, Qs. 12-18, and p. 241, X-Q. 59.
Noiret, pp. 407-408, Qs. 7 and 12.
Culver, p. 549, Q. 4, and p. 550, Qs. 8-10; p. 556, X-Qs. 36 and 38.
Edmondson, p. 639, Q. 5.
Moise, p. 642, Qs. 4-13.

Defendant's salesman Moon was implicated by the testimony of plaintiff's witnesses:

Garber, p. 330, Qs. 11-12.
Lindsay, p. 333, Q. 16.
E. B. Allen, p. 342, Q. 10.
Nelligar, p. 348, Q. 15.

H. M. Allen, pp. 467-469, Qs. 17-22.
Ashton, p. 789, Q. 3.

Defendant's salesman Nottingham was implicated by the testimony of plaintiff's witnesses:

Jolly, p. 286, Q. 17, and p. 288, X-Qs. 30-55.
King, pp. 484-485, Qs. 8-13.
Howard, p. 954, Q. 7, and pp. 957-958, Qs. 22-23.

Defendant's salesman Wilkins was implicated by the testimony of plaintiff's witnesses:

Whitley, p. 389, Q. 26.
White, p. 531, Qs. 3-6.
Walker, p. 541, Qs. 5-7.

Defendant's salesman Starring was implicated by the testimony of plaintiff's witnesses:

Merithew, p. 60, Qs. 5-6.
Heim, pp. 731-732, Qs. 3-11.
Kessel, p. 736, Qs. 11.

Defendant's salesman Rogers was implicated by the testimony of plaintiff's witnesses:

Knowles, p. 66, Qs. 8-12.
Kessell, p. 735, Qs. 3-4.

In denying the statements of plaintiff's witness Kessel, defendant's Salesman Rogers made an interesting and suggestive statement (p. 1603, Q. 5) as follows:

"But I did not say that it could be sold *as* Coco-Quinine, *because* this man had already used the preparation before and it was not necessary to say that."

Defendant's salesman Duvall was implicated by the testimony of plaintiff's witnesses:

Blodau, p. 107, Q. 12; p. 524, Qs. 3-7.
Scott, p. 114, Q. 2.
Kuhn, p. 521, Q. 28.
Blodau, pp. 524-25, Qs. 4-7.

Answering defendant's salesman Duvall's statements respecting his methods and representations in selling Quin-Coco, the plaintiff's witness Blodau testified (p. 524, Q. 4):

> "If that was not his intention I really cannot understand his idea in showing me the Quin-Coco as I had had no calls for Quin-Coco or chocolate quinine, that the only name by which the chocolate quinine preparation has been called for in my store, to the best of my knowledge is Coco-Quinine, and as it (chocolate quinine or Coco-Quinine as it is called) would not interest me owing to the fact of having no sale for it under those names."

Defendant's salesman Richards was implicated by the testimony of plaintiff's witnesses:

Chestnutt, p. 148, Qs. 12-13.
Prochnow, p. 167, Q. 17.
Seeger, p. 666, Q. 5.

Defendant's salesman Kelton was implicated by the testimony of plaintiff's witnesses:

Porter, p. 173, Q. 8.
Kuhn, p. 516, Q. 7-8.
Kuhn, p. 521, Q. 30.
Kuhn, p. 522, X-Q. 36.
Lavison, p. 690, Q. 4.

Mr. Kelton not being at the time in defendant's employ, was called as a witness by plaintiff and as has heretofore been stated, confessed as to his sales methods in pushing Quin-Coco to be used as a substitute for Coco-Quinine.

Defendant's salesman Gonzales was implicated by the testimony of plaintiff's witnesses:

Barnes, p. 180, Q. 10.
Ray, p. 211, Qs. 8-11.
White, p. 532, Q. 9.

Defendant's salesman Wilson was implicated by the testimony of plaintiff's witnesses:

McCorkle, p. 919, Q. 2.
McCorkle, p. 924, Qs. 45-47.
James, pp. 925-26, Qs. 2-3.
Green, p. 964, Qs. 10-13.
Bell, p. 967, Q. 4.

Defendant's sales manager Hagaman was implicated by the testimony of plaintiff's witnesses:

Groves, p. 359, Q. 15; p. 368, Qs. 93-98.
Ege, pp. 418-420, Qs. 3-11.
Lebo, p. 430, Qs. 5-6.
Bell, p. 436, Q. 10, and p. 438, X-Q. 12.
Peabody, p. 448, Q. 15.
H. M. Allen, p. 465, Qs. 5-10.
E. B. Allen, p. 473, Q. 4.
Bolenbaugh, p. 745, Q. 4.
Howard, p. 955, Q. 8.
O'Connell, pp. 975-76, Qs. 7-9.

Witness Willis (p. 479, Qs. 6-7) confirmed the testimony given by Mr. Hardy, a former defendant sales-

man, respecting the methods he used in offering Quin-Coco to the trade, that Hardy told him that it was the same thing as Coco-Quinine, the only difference being in price; that it was a good substitute and nobody could tell the difference; and further:

> "He showed me his sample; had me pour some Coco-Quinine in a clear bottle and asked me if I could tell the difference by looks or taste."

Witness O'Connell, former defendant salesman, testified (p. 978, Q. 15) that he had personally sold Quin-Coco on the representation that there was no difference between Quin-Coco and Coco-Quinine and a good saving in price, and that the physician or patient could not tell the difference; and that he sold the substitute perfumes (Q. 19) by demonstrating that the substitutes could not be distinguished from the original.

Defendant's Officials Responsible.

That defendant's salesmen in selling defendant's product Quin-Coco to be resold or dispensed for plaintiff's product Coco-Quinine and on calls and prescriptions for Coco-Quinine were following instructions received from the officers and sales managers of the defendant concern is abundantly shown by the testimony of men formerly employed by defendant as salesmen who testified as to the teachings and instructions received from such officials and sales managers.

Sales Manager Hagaman was one of the men whose name was most frequently used by witnesses as representing defendant and traveling with its salesmen, teaching and instructing them how to sell defendant's goods. That he specifically instructed them to push

this product according to the methods complained of by plaintiff is shown by testimony of not only former salesmen but of druggists on whom he called in company with former salesmen.

WITNESS BOLENBAUGH, a former defendant's salesman, questioned as to what Mr. Hagaman said to him about Quin-Coco and as to Mr. Hagaman's methods in soliciting orders for this preparation in his presence, and testified (p. 745 Q. 4):

> "Yes, his first trip with me he showed the preparation by pouring it on a piece of white paper, showing it was the same color as Coco-Quinine, Lilly, but a little thinner preparation, run easier, and authorized me to demonstrate it in the same way."

He further testified (Q. 5) that Hagaman represented it to be of the same formula and *color* as Coco-Quinine.

WITNESS HOWARD testified that Mr. Hagaman called on him when in the retail drug business in company with one of defendant's salesmen and solicited his order for goods, among other items, Quin-Coco, and testified (p. 955, latter part of answer to Q. 8) as follows:

> "Mr. Hagaman told me repeatedly that druggists over his territory were using Quin-Coco very largely in substitution for Coco-Quinine and wherever Coco-Quinine was specified or called for. He took his sample of Quin-Coco and asked me to make comparison between it and Coco-Quinine and if I could tell any difference he would not ask me to buy any of his preparations but would make me a present of the best hat in town."

See also the testimony of former defendant's salesman Groves (p. 359, Q. 15, and p. 368, Qs. 93-98), and former defendant's salesman Peabody (p. 448, Q. 15, and p. 451, Q. 27 et seq.), and former salesman O'Connell (pp. 975-976, Qs. 7-9).

Also the testimony of retail druggist Ege (pp. 418-420, Qs. 3-11), H. M. Allen, p. 465,) and Bell (pp. 945-946, Q. 3).

DEFENDANT'S ASSISTANT SALES MANAGER MCNULTY was frequently referred to by witnesses as responsible for the methods used in the sale of Quin-Coco as complained about by plaintiff.

JOSEPH A. GRIMALDI, a former defendant's salesman, called as a witness for plaintiff, testified (p. 750, Qs. 3-4) that he knew Mr. Charles E. McNulty as the assistant sales manager of the defendant concern and that Mr. McNulty visited the local trade with him in the city of Detroit on several occasions, and (Qs. 5-6) that he had observed Mr. McNulty's methods in soliciting orders for Quin-Coco. He was asked (p. 751, Q. 7):

> "Q. 7. Please explain what you have ever heard Mr. McNulty say to a retail druggist when endeavoring to sell him Quin-Coco. A. I have heard the following dialogue take place between Mr. McNulty and the retail druggists:
>
> (McNulty) 'Have you any sale for Coco-Quinine?'
>
> (Druggist) 'Yes, some.'
>
> (McNulty) 'Do you sell very much of it?'
>
> (Druggist) 'Well, some physicians prescribe it quite frequently.'
>
> (McNulty) 'Well, we have a preparation that is very similar, Quin-Coco.'
>
> (Druggist) 'No, I don't believe you have.

There is only one product made that does the work and that is Coco-Quinine.'

(McNulty) 'Well, if you will allow me to show you, I will prove to you that there is a great similarity between the two. Have you any Coco-Quinine on hand?'

(Druggist) 'Yes, I have.'

(McNulty) 'Well, produce two graduates and pour a small amount in one graduate of the Coco-Quinine and I will pour a similar quantity of Quin-Coco in another graduate. Now compare them for color and taste. Are they not practically identical?

(Druggist) 'Yes, there is a great similarity.'

(McNulty) 'Now, you admit that frankly. The only difference is in the cost.'

Q. 8. As I understand your last answer it is stated as a dialogue between Mr. McNulty and the retail druggist? A. Absolutely.

Q. 9. Did you ever hear Mr. McNulty go through this method or dialogue with the retail druggists more than once? A. I did."

See also the testimony of witness Hardy, a former defendant's salesman (p. 370, Q. 6); the testimony of witness Greene, a retail druggist (pp. 506-507, Qs. 8-10); and the testimony of Earle R. Peabody, a former defendant's salesman (pp. 449-450, Qs. 20-21).

See also testimony of witness Frank E. Green, a former defendant salesman (p. 798, Q. 5, and p. 800, Qs. 15-16) showing that McNulty compound the "general appearance" of his substitute items with the original he was seeking to replace.

MR. PEABODY was called to rebut the testimony given by McNulty for defendant in which McNulty denied employing or teaching methods in the sale of any of de-

fendant's goods which suggested to the retail druggist that any of their items might be bought and resold, or dispensed, on calls for items made by competing houses.

The incident related by the witness is interesting and a complete rebuttal of McNulty's testimony.

The witness explained that Mr. McNulty called him to his hotel, the Hotel Essex in Boston, and sent him out to purchase two bottles of Fletcher's Castoria. This the witness did. McNulty then took the two bottles of genuine Fletcher's Castoria and from them filled one of defendant's Dr. Hobson's Castoria bottles, of larger size, McNulty remarking as he filled defendant's bottle with the genuine Fletcher Castoria:

> "I guess they can't tell any difference now between the Dr. Hobson's and the Fletcher's."

The witness explained that McNulty used this Dr. Hobson's bottle filled with the genuine Fletcher Castoria in soliciting the drug trade to buy the Dr. Hobson's Castoria asking the prospective customer to compare the contents of the Dr. Hobson Castoria bottle with one of the original Fletcher's and asked him if he could detect any difference "in taste or color" in the two preparations, explaining that as the Dr. Hobson bottle contained more than the original Fletcher's that his margin of profit would be greater.

Defendant's assistant sales manager Ritayik after declaring that he practiced and taught methods recognized as ethical in the sale of defendant's goods to retail druggists and related the kind of sales talk he employed, saying that this was his regular practice and that he made such statements to many druggists, was asked to name some of the druggists whose business

he had solicited with such talk. Notwithstanding his apparent perfect familiarity with his alleged talk to the druggists, he was unable to give the name of a single one (p. 1615, X-Qs. 26-30).

The record shows a number of different instances where other of the defendant's products were sold with the argument that they could be substituted at a profit to the druggist for like articles or items made popular by extensive advertising and detail work of other houses. The incident above related, however, is one of the most aggravated cases of fraud shown by the record, McNulty in his sales work using not defendant's imitation product but the genuine article of the original manufacturer, with which he had refilled one of defendant's Dr. Hobson's bottles, so that it was absolutely impossible for anyone to detect the fraud, with an appeal to the avarice or cupidity of the druggist by showing him that the profit in handling the imitation would be greater because defendant's package was larger and contained more than the package of the original manufacturer.

Mr. Henry Pfeiffer, the president of the defendant concern, was referred to by a number of witnesses as having traveled with salesmen and participated in the sale of goods, not only approving but participating in the fraudulent practices complained of by plaintiff in inducing druggists to buy defendant's goods.

Witness G. A. Lavison, a retail druggist of Memphis, Tenn., called as a witness for plaintiff testified (p. 690, Qs. 4-5) that Mr. Kelton urged him to buy Quin-Coco, representing it as exactly the same in every respect as Coco-Quinine and saying it could be used as a substitute on physicians' prescriptions written for Coco-Quinine without anyone knowing the difference.

He explained that he hesitated to accept Mr. Kelton's representations and did not buy when he was first solicited, but the next day Mr. Kelton returned with Mr. Henry Pfeiffer and again took up the subject and that Mr. Pfeiffer represented Quin-Coco the same as Kelton had, as the same as Coco-Quinine, and told him that it could be used for Coco-Quinine in any way that Coco-Quinine was used, and that both of them assured him that it was the same thing and much cheaper, the inducement to purchase being the cheaper price.

See also testimony of witness Thurman (pp. 806-7, Qs. 3-6) showing the character of work Mr. Pfeiffer taught his salesmen to do.

Under such a state of facts, surely defendant is accountable for the resulting fraud, deceit and imposition upon the public,and likewise for the injury to the reputation of the physician, and to the reputation, good-will and business of plaintiff resulting from serving the inferior product.

Mr. J. K. Lilly (p. 914, R-X-Q. 126) states very fairly and clearly wherein the manufacturer is responsible as well as the retail druggist for the practice of substitution. He was asked by counsel for defendant if, after all, it was not "a mere matter of honesty" on the part of the druggist. He replied:

> "Not altogether. It is a question of his honesty in the main, *but of course he must have the weapons to use* in order to substitute one preparation for another formula. In other words, the preparation must so closely resemble the original that he could use it to deceive. *This is where the manufacturer has some responsibility.*"

In the authorities presently to be reviewed will be

noted several holding as, for example, in the case of *Coca-Cola Co. vs. Gay-Ola Co.*, 200 Fed. 720, that:

> *"It is not necessary to show that the immediate purchasers were deceived as to the origin of the goods; but even if they thoroughly understand that they are buying the counterfeit and not the genuine the manufacturer of the counterfeit will be enjoined from selling it to dealers with the purpose and expectation that it shall be used by the dealers to deceive the consumer."*

Citing also *Garrett v. Garrett* (C. C. A.), 78 Fed., 472-476, and a number of other cases.

As showing Mr. Henry Pfeiffer's further participation with salesmen in these methods of selling Quin-Coco and other items, see the following testimony:

Hardy (a former defendant's salesman) p. 370, Q. 6.
Thurman (a former defendant's salesman) p. 392, Qs. 8-9.
Kuhn (a Nashville druggist) p. 517, Q. 10.

Debauchery of the Trade.

The demoralizing influence of this sort of teaching upon the retail drug trade will be appreciated from the testimony already reviewed. See, further, the testimony of Mr. Lavison, who apparently was accustomed to follow ethical rules in his store. On cross-examination he was asked (p. 698, X-Q. 64) what he would do when he did not have a certain drug or preparation called for over the counter. The witness replied that he would send out for it or not make the sale. He was then asked:

X-Q. 65. Do you state that that is absolutely true in every case? A. I have stated there that

I substituted Quin-Coco for Coco-Quinine, for the reason that both Mr. Kelton and Mr. Pfeiffer said that I could do so as they were one and the same thing, and that is the reason that I did so in that case. I did not do so in any other case that I can remember. And I did this because they told me so positively that it was all right to do so."

WITNESS JOHN W. CULVER (pp. 552-553, X-Qs. 14, 22 and 23) testified as did many others in justification of their purchases of Quin-Coca and their practices in passing it off on calls and prescriptions for Coco-Quinine. His testimony is but illustrative. It will bear quoting, and is as follows:

"X-Q. 14. Then you were a willing purchaser were you not of Quin-Coco? A. To the extent that I accepted his guarantee on behalf of his company for the product being identical with Coca-Quinine and therefore subject to use in place of Coco-Quinine on that account.

* * * * * * * * * * *

X-Q. 22. When you get a prescription or a call over the counter for a specified preparation and without saying anything about it, you fill it with a similar preparation, therapeutically, do you consider that honest practice in a drug store? A. I consider it bad practice from a commercial as well as a moral standpoint.

X-Q. 23. What I want to know is, whether, in your opinion, it is honest practice for a druggist on a prescription or call for one drug, to fill the order with a similar drug, without telling the physician or the customer. A. At that time I considered the guarantee of the manufacturers through their representatives made this a defensible act on my part, to fill or have these prescriptions for Coco-Quinine, filled with Quin-Coco, which on the manufacturer's representations was

absolutely identical with and could not be detected from Coco-Quinine. As to my present views in the matter, I do not approve of it, and the last year, or the greater part thereof, that I was in the retail drug business I discontinued handling Quin-Coca, *as the only use I had for it was in substitution for Coco-Quinine.*"

In view of this testimony, it can not be seriously contended that defendant's responsibile officials were not responsible for the sales policy pursued by its salesmen, resulting in the fraudulent practices by its distributor-customers, the retail druggists, complained of by plaintiff.

(k) *The name "Coco-Quinine" Identifies Plaintiff's Product and Represents Plaintiff's Good-Will.*

Nearly all druggists and physicians, as well as dealers called as witnesses testified that Coco-Quinine is generally recognized in the trade as the product of Eli Lilly and Company and whether or not the name "Lilly" is written in connection with the name "Coco-Quinine" on prescriptions, the name by itself is sufficient to identify plaintiff's product; and many that even when called for by the name "Chocolate Quinine," plaintiff's product is understood to be the thing asked for because the names cocoa and chocolate are frequently confused in the minds of people not thoroughly conversant with the technical name, and therefore the name "chocolate" is frequently used in the place of cocoa when calling for plaintiff's preparation, and that this practice prevailed for a long time prior to the advent of defendant's product.

Many witnesses testified in support of this contention, including the following:

Merithew, p. 60, Q. 3.
Knowles, p. 65, Q. 3.
Wright, p. 68, Q. 4.
Havenor, pp. 72-73, Qs. 4-5.
Van Schaak, p. 74, Q. 3.
Dr. Hoskins, p. 76, Q. 6.
Wolsey, p. 77, Q. 3.
Kinder, p. 81, Q. 3.
Walker, p. 84, Q. 3.
Schuh, p. 85, Q. 2.
Kenckell, p. 87, Q. 3.
Jennings, p. 92, Q. 2.
Sand, p. 103, Q. 9.
Koellein, p. 105, Q. 3.
Manning, p. 109, Q. 2.
Tague, p. 111, Q. 11.
Scott, p. 114, Q. 2.
Bracy, p. 124, Q. 3.
Knox, p. 125, Q. 4.
Blodau, p. 126, Q. 3.
Soulier, p. 127, Q. 4.
Dr. Randolph, p. 128, Q. 2.
Dr. Gremillion, p. 129, Q. 2.
Gravel, p. 130, Q. 4.
Dr. Perkins, p. 132, Q. 2.
Bowden, p. 138, Q. 3.
Fry, p. 141, Q. 3.
Richard, p. 143, Q. 2.
Chestnutt, p. 147, Q. 2.
Spurlock, p. 154, Q. 4.
Schaefer, p. 155, Q. 4.
Gilmer, p. 161, Q. 5.
Prochnow, p. 165, Q. 2.
Porter, p. 172, Q. 2.
Barnes, p. 180, Q. 3.
Samson, p. 187, Q. 6.
Lyons, p. 190, Q. 2.
Fitch, p. 194, Q. 2.

Heno, p. 201, Q. 3.
Walsdorf, p. 206, Q. 3.
Dr. Arrington, p. 209, Q. 2.
Ray, p. 210, Q. 2.
F. I. Ames, p. 216, Q. 2.
W. S. Ames, p. 217, Q. 2.
Colvin, p. 235, Q. 3.
Albright, p. 236, Q. 2.
McMillan, p. 244, Q. 2.
Shepherd, p. 247, Q. 2.
Vaughan, p. 254, Q. 2.
Dr. Walker, p. 258, Q. 2.
Barber, p. 260, Q. 4.
Northington (Jobber), p. 264, Q. 4.
Greil, p. 267, Q. 4.
Dr. Pearson, p. 271, Q. 2.
Reid, p. 272, Q. 3.
Moseley, p. 277, Q. 5.
Cunningham, p. 282, Q. 3.
Jolly, p. 285, Q. 3.
Greene, p. 296, Q. 2.
Coleman, p. 298, Q. 8.
Dr. Pumpelly, p. 301, Q. 4.
Riley (Jobber), p. 302, Q. 3.
Marshall, p. 306, Q. 2.
Fort, p. 308, Q. 3.
Burton, p. 321, Q. 6.
Dr. Fisher, p. 324, Q. 2.
Caurdo, p. 326, Q. 2.
Garber, p. 329, Q. 4.
Lindsay, p. 332, Q. 2.
Nelligar, p. 347, Q. 4.
Dr. Hargrave, p. 351, Q. 2.
Gorner, p. 379, Q. 23.
Whitley, p. 387, Q. 3.
Noiret, p. 407, Q. 3.

That when doctors write prescriptions for Coco-Quinine, they mean none other than the Lilly product is clearly shown by the testimony of Dr. Perkins (p.

132, Q. 3). Dr. Perkins was asked how he writes his prescriptions for this product, and answered:

> "'Coco-Quinine,' and sometimes I specify Lilly's, and when I do not, it is understood that my intention is to prescribe Lilly's product, that being the one I have learned to recognize as the originator of the medicine."

In answer to Q. 5, he stated that he never knew that there was any other product that was being used as a substitute for Lilly's Coco-Quinine.

See also the testimony of:

Dr. Walker, pp. 84-85, Qs. 4, 5, and 11.
Dr. Randolph, p. 129, Q. 4.
Dr. Gremillion, p. 129, Q. 5.
Dr. Fry, p. 141, Qs. 5-6.
Chestnutt, p. 147, Q. 7.
Dr. Ferguson, p. 152, Qs. 4-5.
Dr. Spurlock, p. 154, Qs. 5-6.
Schaefer, p. 156, Qs. 6-7.
Prochnow, p. 166, Qs. 4-5.
Porter, p. 172, Q. 6.
Heno, p. 201, Qs. 7-8.
Dr. Arrington, p. 209, Qs. 5-6.
Adams, p. 243, Q. 6.
McMillan, p. 244, Q. 9.
Dr. Walker, p. 258, Qs. 3 and 4.
Barber, p. 260, Q. 8.
Dr. Pearson, p. 271, Qs. 4-5.
Reid, p. 272, Qs. 6 and 7.
Moseley, p. 277, Q. 8.
Cunningham, p. 282, Q. 7.
Moore, p. 284, Qs. 6-9.
Jolly, pp. 284 and 286, Qs. 6 and 7.
Greene, p. 296, Qs. 5 and 6.
Coleman, p. 299, Qs. 11 and 12.
Dr. Pumpelly, p. 301, Qs. 5 and 6.

Franklin, p. 304, Qs. 6 and 7.
Marshall, p. 306, Q. 7.
Ridenour, p. 320, Qs. 6-8.
Burton, p. 321-22, Qs. 7 and 11.
Dr. Fisher, p. 324, Qs. 3-6.
Cavedo, p. 326, Qs. 11-13.
Lindsay, pp. 332-333, Qs. 8-10.
Allen, p. 342, Q. 5.
Arrington, p. 349-50, Qs. 7 and 10.
Dr. Hargrave, p. 351, Qs. 3-4.
Dr. Eskridge, p. 375.
Ashton, p. 790, Qs. 6-7.

That Coco-Quinine is sometimes called for and in some localities frequently, by the name "Chocolate Quinine" and that the druggists readily understand such calls to mean plaintiff's Coco-Quinine, is shown by the testimony of numerous witnesses.

WITNESS HAVENOR, manager for the Fuller Medicine Company, wholesale druggists of Chicago, one of the largest drug houses in the United States, testified (p. 73, Qs. 4-5) that if they would get an order for a chocolate quinine preparation not specified otherwise, they would furnish Lilly's Coco-Quinine, his understanding being that this was what the customer intended.

WITNESS VAN SCHAAK (p. 74, Q. 7) also representing a large wholesale drug house, testified to the same purpose, saying:

> "We would give Lilly's Coco-Quinine. That is the only item of the kind we carry in stock, and it might be ordered by two or three different names."

WITNESS WOLSEY, retail druggist of Cape Girardeau, Missouri, testified (p. 77, Q. 6) that if a customer should ask for a chocolate quinine preparation he

would suppose him to be ordering Eli Lilly and Company's Coco-Quinine.

Witness Kinder, a retail druggist of Cape Girardeau (p. 83, Q. 27), testified that if a customer should ask for chocolate quinine or a chocolate quinine preparation, he would understand him to want Coco-Quinine.

Witness W. S. Adams (p. 219, X-Qs. 13-17) explained that cocoa is the name of an article commonly called by the laity "chocolate," and that the laity regard cocoa as chocolate, and that they ask for chocolate quinine occasionally because they get chocolate and cocoa confused in their minds.

Witness W. S. Ames (p. 219, X-Qs. 13-17) ex- that when a customer asks for Chocolate Quinine he understands the customer to mean plaintiff's Coco-Quinine, and when asked why he had this understanding replied:

> "Well, Eli Lilly's Coco-Quinine is known as the original 'coco-quinine' or 'chocolate quinine,' and the only one that I have ever dispensed or have ever seen, and is the preparation the customers have alwaye been using. I would really be afraid to give anything except Lilly's Coco-Quinine, believing that I would be substituting and not supplying the customer with the article they desired, and in the case of a physician's prescription I would not dispense anything except Lilly's Coco-Quinine as I don't care to take the responsibility on my own shoulders of giving anything except what the physician specifies."

To the same purport is the testimony of the following witnesses:

Schuh, p. 86, Q. 13.
Henckell, p. 88, Q. 18.
Bryant, p. 89, Qs. 8-9.
Jennings, p. 93, Qs. 6-8.
Manning, p. 110, Q. 13.
Porter, p. 173, Q. 10.
Lyons, p. 191, Q. 11.
W. S. Ames, p. 218, Q. 10.
Albright, p. 238, Q. 22.
Daly, p. 257, Qs. 14-17.
Reid, p. 274, Qs. 20-22.
Moseley, p. 277, Qs. 9 and 10.
Moore, p. 284, Qs. 13 and 14.
Jolly, p. 286, Qs. 8 and 9.
Marshall, p. 306, Q. 9.
Lindsay, p. 333, Q. 14.
Garner, p. 383, Qs. 70-73.
Garner, p. 384, Q. 75.
Turner, p. 386, Qs. 21 and 22.

That defendant's claim that its product, Quin-Coco, was put on the market to supply a demand for "chocolate quinine," a demand existing independently of the demand for plaintiff's Coco-Quinine, cannot be regarded as anything more than mere pretense, for the defendant officials who testified to this fact well knew, and if frank in their testimony would have acknowledged, that the demand for so-called "chocolate quinine" was a demand created for the product Coco-Quinine by Eli Lilly and Company, the plaintiff herein, by great effort and at great expense by "detail" work among the physicians throughout the country. After the demand was created and the market established, then defendant entered the field and, without the expense of creating the demand, offered at a considerably lower price this counterfeit product designed particularly to supply the demand that plaintiff

had created. Defendant's officials observed that plaintiff had established a good demand in this item and saw an opportunity to appropriate to themselves the profits of the business by sending their salesmen around with the cheaper preparation and inducing the retail druggist to buy it to supply the demand for plaintiff's product and thereby make more money for himself. Every circumstance leads directly to such conclusion and to the further conclusion that defendant's excuses in justification of its acts are mere pretext and sham.

A late comer in the field (plaintiff having had its preparation on the market seven years before defendant succeeded in counterfeiting it), defendant sought to cause confusion in trade rather than to avoid confusion, as was clearly its duty and legal, as well as moral, responsibility.

> "The burden is on the later comer in an established field to exercise a proper degree of care and caution in these respects, so as to avoid such deception or confusion. If defendant had performed its full duty in these respects, it would not be responsible for wrongful acts of retailers in substituting one wine for the other; but this the defendant has not done. It has adopted a trade-mark of such similarity that, taken with other similarities in bottle, label, and dress, the natural and probable result is that purchasers are confused or deceived. It must therefore be held responsible for all the consequences of its neglect or default; that is, in the present case, held responsible for the substitution practiced by retailers of Virginette for Virginia Dare, and the appropriation in consequence thereof of some part of complainant's good will and established trade.
>
> The wrongful consequences of defendant's conduct is intensified by its business policy of re-

fraining from advertising, and of selling this wine in bulk and at lower prices, and thereby enabling it to appropriate in larger measure the results of complainant's efforts and advertising, and tempting retail distributors to indulge in substitution and unfair competition."

Garrett & Co. v. A. Schmidt, Jr., & Bros., Wine Co., 256 Fed., p. 943, on p. 947.

(1) *Passing Off by Defendant's Methods Is Fraud.*

It is submitted that when the public (in this case the prescribing physician as well as the laity) having become accustomed to use this medicine, ask for plaintiff's product they are entitled to receive plaintiff's product, and that to furnish anything else than plaintiff's product is fraud.

The testimony already reviewed shows many instances of actual "passing off." The admissions of druggists show that they are aware that the practice is wrong and fraudulent. But they excuse their acts by saying defendant's agents told them they could do it.

It will be understood, of course, that to obtain testimony from druggists, particularly voluntary testimony, admitting these practices is very difficult as it is equivalent to a confession of dishonest practices on the part of the druggist himself. Therefore, the considerable number of instances proved in this case should be regarded as but samples of the practice which is followed generally by those who purchase defendant's product.

The sales of Quin-Coco, defendant's product, have been shown to be large, claimed by some of the witnesses to far exceed the sales of plaintiff's Coco-Quinine in several localities (for example, Kelton, p. 97,

Q. 14). It must be disposed of in some manner by the druggists who buy it. If the druggists have no calls or prescriptions for the product, the inference naturally follows that it is dispensed, as stated by so many witnesses, as a substitute for Coco-Quinine, and on calls and prescriptions for Coco-Quinine, thus taking from plaintiff the business and the profits in supplying the demand for Coco-Quinine, a business created and built up by plaintiff by great effort and at great expense.

(m) *Similarity of Trade Names and Likelihood of Confusion.*

That it is difficult, even for those familiar with the two products, to distinguish them by their respective names, is clearly shown throughout the record. Frequently, during the taking of testimony, counsel in examining witnesses would refer to the respective products by the wrong names, calling plaintiff's product "Quin-Coco" or defendant's product "Coco-Quinine" inadvertently.

It is not necessary to refer to these instances, many of which were corrected, but that they exist is shown by the admission of counsel for defendant on the record. In cross-examining witness Broussard in reference to a statement related by the witness concerning a conversation between one of the defendant's salesmen and himself, in which conversation the defendant's salesman had claimed to have sold five gallons of Coco-Quinine and the witness had told the salesman that he had not sold *any* Coco-Quinine because he did not have it for sale, and the defendant's salesman answered that he meant "Quin-Coco," which was the same thing. Counsel for defendant asked the witness (p. 186, Q. 11):

"Have you noticed, or do you know, that all through these depositions counsel in referring to either of these products have got the names mixed in the record so that the examiner has had to correct them?"

"Inherent Improbability."

Counsel for petitioner stress what they term the "inherent improbability of the respondent's case" (p. 36 et seq., Petitioner's brief.) They contend that because the old house of William R. Warner & Company bore a good name and for many years enjoyed an enviable reputation in the drug trade, it is inherently improbable that the present corporation named "Wm. R. Warner & Co.," organized in July, 1908—seven years after the death of Mr. William R. Warner—to take over the old house, which corporation is largely owned and absolutely controlled by the owners of the Pfeiffer Chemical Company of St. Louis (G. A. Pfeiffer, p. 1227, Q. 219), can, under its present management be guilty of the things complained of.

It is true that the old firm of Wm. R. Warner & Company was for many years engaged in the business of manufacturing chemists in the city of Philadelphia and enjoyed an extensive business with a high reputation as ethical manufacturers. This old firm should not, however, be confused with the corporation doing business today under the same name, but under the management of Messrs. Henry Pfeiffer and G. A. Pfeiffer. William R. Warner died in 1901 and after his death the business began to drift until in the summer of 1908 it was acquired by the enterprising owners of the Pfeiffer Chemical Company of St. Louis, Missouri. The Pfeiffer Chemical Company was started as a patent medicine concern about the year 1901 and

early began its practice of copying as nearly as possible the specialties and widely advertised preparations of other concerns and offering them to the drug trade to replace such specialties or to be substituted therefor. From time to time these men acquired established businesses of other concerns, some of which had an established reputation in pharmaceutical lines and some of which had widely advertised "patents" and specialties. It acquired the Kick-a-poo Remedies, the Bucklin line, King's New Discovery, Meade & Baker's mouth wash, Sloan's liniment, Searle & Hereth of Chicago and Wm. R. Warner & Company of Philadelphia, the last two houses being manufacturers of pharmaceuticals and of high reputation, but both reported to be in need of financial support when taken over.

While the long established reputation of Wm. R. Warner & Company and its good will were of great value, this does not change the fact that its policies were directed by the new management, the Pfeiffers of St. Louis, from the time the business was taken over (Kelton, p. 102, X-Q. 46). The names of these old concerns were used by the new owners as might be to their greatest advantage for money making purposes. (G. A. Pfeiffer, p. 1228, Qs. 231-233.)

It is not hard to see how a retail druggist who had for many years become accustomed to regard Wm. R. Warner & Company as an ethical house, when approached by a salesman representing that house, could be easily influenced by the representations the salesman might make, and particularly as in some instances, such as referred to in the testimony of Mr. Lavison, of Nashville, Tenn. (p. 698, X-Q. 64), and the testimony of Mr. Thurman (p. 807, Qs. 3-6), when

the salesman was accompanied by the president of the corporation, who joined with the salesman in assurances that the item offered for sale, as in that instance, Quin-Coco, could be purchased by the druggist and resold for Coco-Quinine. That the present management of the defendant concern should seek to utilize the fair name and high reputation of William R. Warner to influence the retail druggists, whose confidence he enjoyed, to do the things complained of merely aggravates the offense.

The practice of substitution, or of offering substitutes, and particularly Quin-Coco for Coco-Quinine, was so common that the officials of the Company seemed to regard it as a joke. This is shown by the testimony of Thurman (p. 809, Q. 14) where he tells of one instance where Mr. Merner, treasurer of the company, spoke of some retail druggist who had dispensed so much Quin-Coco from his Coco-Quinine bottle, Lilly, that the label on the bottle had become so dirty as to be illegible and the druggist had asked the Lilly salesman if he could not send him a fresh label to place upon this bottle. Mr. Merner was laughing about it.

It will be remembered that a similar incident was mentioned by plaintiff's witness and salesman Tisdale (pp. 249-250, Qs. 10-16), who told of retail druggists asking if he could not obtain fresh Coco-Quinine labels for their Coco-Quinine bottles so that the doctors when coming behind the prescription counter might note that he was apparently using Coco-Quinine, Lilly, on their prescriptions when, as a matter of fact, they were, then and previously dispensing Quin-Coco, but out of a Lilly Coco-Quinine bottle so that the physicians could not detect the fraudulent practice.

DEFENDANT'S OTHER SUBSTITUTES.

The record abounds with references to other items manufactured and sold by the defendant concern to be used as substitutes for similar items previously manufactured and made popular by other concerns. One favorite line of substitutes offered to the trade by defendant's salesmen apparently was their perfumes.

The testimony of Mr. Thurman (pp. 807-809, Qs. 4-13) shows the practice referred to and that it was a well recognized policy of the house is shown by the further fact that Mr. G. A. Pfeiffer also supported the policy. This is shown by the testimony of Thurman (pp. 822-823, Qs. 81-82).

It will be noted that this testimony was given by the witness with Mr. G. A. Pfeiffer present while the witness was testifying and no word of denial as to the incident was made then or later.

WITNESS VAN DALE testified (pp. 721-724, Qs. 3-18) that while he was a traveling salesman for the defendant concern, he noted comparisons between Quin-Coco and Coco-Quinine being made by Mr. Garvin by placing the respective preparations on white paper. He also told of the use by the salesmen of a perfume card furnished by the defendant concern to its salesmen and having on one side a list of perfumes of well known and widely advertised makes and on the opposite side a corresponding list of the defendant concern's substitutes.

WITNESS MEYER testified (pp. 725-728, Qs. 2-15) that he recognized the exhibit perfume cards referred to saying that the card on one side showed the names of the original perfumes and on the other side the names of the defendant concern's perfumes, which were de-

signed to be used as substitutes for the original, the number of the substitute on one side corresponding with the number of the original which it was designed to be substituted, listed on the other side.

The witness testified that he was the man who made these substitute perfumes for the defendant concern and he was given his instructions by his employers, the Messrs. Pfeiffer, saying (p. 727, Qs. 9 and 10) that:

> "They would bring me the report of some of their salesmen, to the effect that such and such an odor has a good sale; such and such an odor from another concern would have a very good sale, and that it would help our perfume business by reproducing it as faithfully as possible in a competitive article, meaning, of course, substitute our perfume with a somewhat similar name, or maybe a different name (as the name 'Vogue' is entirely different from 'Jickey') from the original perfume. * * * They would bring an original package or sample of the competitive brand, or original brand."

Witness Charles F. Allen, a former traveling salesman and assistant sales manager for the defendant concern, testified (pp. 755-756, Qs. 5-13) that he recognized the exhibit perfume cards as like one carried by himself and the other defendant's salesmen in selling perfumes, explaining that the perfumes listed on one side were the perfumes of the defendant concern and numbered to correspond with the perfumes on the other side, listed by the name of the original maker.

The inducement to the druggist to buy the substitute perfumes was the same, of course, as to buy the substitute pharmaceuticals, that is, to get something which he could dispense to supply the demand for the

original articles created by the original manufacturers and make a larger profit than would be possible by handling the original goods.

Plaintiff's Exhibit "Document No. 3."

the "blue list"

As indicating the policy of the defendant concern, plaintiff introduced in evidence as exhibits several editions of a certain document commonly referred to by the witnesses as the "Blue List," the same being a list of a large number of pharmaceutical preparations manufactured and first introduced and made popular by the other concerns, the name as adopted by the original manufacturer with the price of the goods and name of the original manufacturer being listed on the left-hand side of the sheet and the defendant's substitute preparation with its price being listed on the right-hand side of the sheet, each of defendant's substitute preparations being opposite the original preparation which it is designed to be used in the place of.

These lists were supplied by defendant to its salesmen in order that they might readily call to the attention of the retail druggist the defendant's preparations which might be used in the place of the original preparations, and show the difference in price as the inducement to buy. For example, near the bottom of page 1 of the list we find "Coco-Quinine, Eli Lilly and Company," the five-pint bottle being listed at $3.30 per bottle, while opposite thereto is "Quin-Coco, S. & H," the five-pint bottle being listed at $2.50. The defendant's salesman with this list was able to show the retail druggist how he could fill his prescriptions and calls for plaintiff's Coco-Quinine with defendant's

Quin-Coco and save 80c on a five-pint bottle; and, of course, make a proportionate or larger saving by buying larger quantities.

That said list was intended for such use and was so understood by the salesmen, is clearly shown by the testimony of a number of defendant's former salesmen who were examined as witnesses for plaintiff. For example, Earle R. Peabody testified (p. 447, Q. 11) on being shown the list and asked if it was used by Mr. Hagaman, defendant's sales manager, and if so, what use he made of it, answered:

> "Yes, it was used by Mr. Hagaman and as replaces for the advertised articles, that is the way I understood it, that these items of Warner's and Searle & Hereth's opposite the advertised preparations were exact replacers for them."

Witness Kelton, another salesman formerly employed by defendant, on being shown the list and asked if he recognized it and what it was, stated (p. 97, Q. 19):

> "It brings tears of pleasure and regret and several other 'res' to see this familiar paper before me. It seems like shaking hands with an old friend. It is, as before stated, what was known to me as our 'replacer's' list, and I always invariably tried to knock the eye out of every product known on this 'replacer' list as the original and sell our own 'replacers' which were printed on said list."

He was asked (Q. 20) what information the list gave relative to Coco-Quinine and Quin-Coco, and replied:

"The paper was always used by me to demonstrate the difference in the price between Quin-Coco and Coco-Quinine."

Similar testimony is given by other witnesses who formerly were employed by the defendant concern as salesmen as follows:

WITNESS THURMAN (p. 399, X-Q. 57), in reference to this "Blue List" testified:

"The blue list * * * contains the leading sellers and original specialties put out by the different houses and for which substitute preparations are offered by the Pfeiffer Chemical Company."

A long controversy following between counsel for defendant and witness over the question of what are and what are not "substitutes" and what is and what is not "substitution" is illuminating; also as to what is honest and dishonest on the part of salesmen. On this last point counsel endeavored to embarrass the witness by having him admit that he had been guilty of dishonest practices (X-Qs. 75-80). Witness justified the salesmen by placing the responsibility on the house.

On this subject see also, among others, the testimony of the following witnesses:

Hooper, p. 15, Q. 5; p. 17, Qs. 10-12.
Groves, p. 358, Q. 5.
Hardy, p. 375, Q. 56.
Thurman, p. 394, Qs. 17-18.
Peabody, p. 447, Q. 11.
Kuhn, p. 521, Q. 29.
Perine, p. 659, Qs. 6-7.

Bolenbaugh, p. 748, Qs. 22-23.
O'Connell, p. 975, Qs. 6-7.

Defendant attempted to offset the effect of this exhibit as evidence by discovering and obtaining from some former Lilly salesman a list which counsel for defendant put into the record, by agreement with counsel for plaintiff, with a statement printed on pp. 882-884, alleging in his statement submitting it that it is a list of "precisely the same significance as the Warner list offered in evidence by plaintiff and marked 'Plaintiff's Exhibit Document No. 3.'"

Mr. Charles J. Lynn, general manager of the plaintiff concern, was questioned in respect to this list (p. 860, Q. 12) and testified that the list was brought to his attention about a year or so after he became general manager of the business, January 1, 1907, stating that it had been in existence for some months before he learned of it, but as soon as it was brought to his attention he immediately instructed that its use be discontinued and that copies in possession of their salesmen be withdrawn and that to the best of his knowledge this was done; that the plaintiff concern had not except for this short time used such a list and, so far as he knew, no such list had been in possession of plaintiff's salesmen since his instructions were given (about Jan. 1, 1908) to withdraw the list referred to.

He explained further that the assistant who put out the list explained to him that he did it to save correspondence as traveling men frequently wrote in for the name of the Lilly item that would compete with some other item in the same field made by some other house, and in response to such inquiries he would send a copy of the list but afterwards concluded to send a copy to each salesman. Mr. Lynn

testified that he reminded the assistant that such a list was in absolute violation of the policy of Eli Lilly and Company because of the use to which an unscrupulous salesman might put it, to which the assistant replied that he felt that the statement with which he had headed the list made the Lilly position perfectly clear and that with such a statement he thought that the list would not be objectionable to the management. He also testified that the assistant called attention to the fact that no comparison of prices was made on the list and that such comparison was necessary in order to enable the salesman to push a product as a substitute for another. Notwithstanding the assistant's explanation, and the evident innocent purpose and character of the list, Mr. Lynn ordered the list immediately withdrawn and its use discontinued. This was done and no such list ever used in plaintiff's business thereafter.

The statement heading said list, as prepared and put out by said assistant, solely for his own convenience in saving writing letters, is as follows:

"COMPETITIVE PREPARATIONS

The following is a list of proprietary or semi proprietary articles made by other manufacturers followed by the name of a competing preparation made by ourselves.

It must be distinctly understood that our product is in no instance offered as a duplicate, a substitute or 'the same as' but on the contrary is submitted to the profession as a preparation that meets similar pathological conditions, or in other words, is a competing preparation the formulas of which may differ in many instances."

The list follows, beginning:

Aboline—PETRONOL," etc.

In no instance was the price of any article, either as made by the plaintiff or by the competitor given on the list.

Mr. J. K. Lilly was also questioned respecting this list by counsel for defendant on cross-examination (p. 905, X-Qs. 67-73) and explained that such a list had not been used by his company for a great many years; that he could not state when it was used but that Mr. Lynn might possibly locate the year when it was used.

Mr. J. K. Lilly further stated in reference to this "Competitive List" (p. 907, X-Q. 85):

> "Many of these Lilly preparations have been in use and manufactured by all manufacturers for so many years that their origin is unknown to me."

And further in respect to the purpose of the list (pp. 913-914, Re-D. Q. 122):

> "It was for the information of our salesmen and detail men. When finding the trade or physicians using quantities of competing preparations we could present the merits of our preparations that were designed to fill the same needs. In no case were these preparations intended as substitutes, as clearly indicated at the heading of the list in question."

If counsel for defendant believed that in this list he had found evidence that plaintiff was guilty of the same practices complained of by plaintiff, he certainly failed to obtain any proof of it. Mr. Lynn and Mr. Lilly both answered frankly respecting the list in so far as they had knowledge of it, and Mr.

Lynn showed clearly that no such list was ever approved by the management, or had ever been used with the knowledge of the management, or had ever been used at all for a period of more than a few months and, moreover, that the list itself showed on its face that it was nothing more than to give the salesman information as to the name of the Lilly product which correspond in physiological action with the competing product; no effort in any case having been made to imitate the physical appearance of the competitor's item. Many of plaintiff's preparations named in the list were of different formula and different physical appearance from the competing items and intended only to compete as medicines. However, notwithstanding the comparative innocent character of the list, the management ordered its use discontinued as soon as its existence was discovered, for fear some salesman might make unfair use of it.

ETHICS—PLAINTIFF'S STANDARDS.

Counsel for defendant during the taking of the testimony endeavored time after time not only as above indicated but also in various other directions to show by the witnesses that defendant's methods of which plaintiff complains in this case are similar to methods followed by other houses, and further, that plaintiff itself has been guilty of the same kind of practices. That plaintiff has the reputation in the drug trade of being one of the most ethical in the business and that its policy is controlled by the highest ethical standards and practices is testified to by numerous witnesses throughout the record. It is not necessary to prolong this brief by quotations or extended references to such testimony. It is shown by the testimony of wit-

ness Kelton that the Pfeiffer's themselves recognized the fact.

Mr. Kelton was asked (p. 98, Q. 23) his opinion of the standing of the house of Eli Lilly and Company, and he answered:

> "I have always heard Mr. Pfeiffer (and I trust I will be pardoned for referring to him so often) refer to Eli Lilly and Company as the most ethical pharmaceutical house in the United States."

The spirit controlling the Lilly policy is shown by an incident that occurred after the beginning of the taking of testimony in this case. At the close of the first day's session in Indianapolis a conversation took place between Mr. G. A. Pfeiffer, on the one side, and Mr. Lilly and Mr. Lynn, on the other, in which Mr. Pfeiffer had suggested that there were certain items on the Lilly list which were original with Wm. R. Warner & Co. Mr. Lynn when testifying (p. 857, Q. 9) relative to certain items on the Lilly list that defendant contended were original with other houses, said:

> "I note in this list several items made by one or another of the Warner associated houses which, since the beginning of this suit we have taken out of our list following a conversation with Mr. G. A. Pfeiffer in which he stated that in those items he felt we were trespassing on his rights. This was the first suggestion from Mr. Pfeiffer that he felt we should withdraw these items or modify them that had come to my attention, and in withdrawing these items or modifying them to meet his views we only followed what has been our invariable custom whenever we have been advised by other manufacturers that we have unwittingly trespassed in any way."

Again (p. 859) in answer to Q. 10 he said.

> "It is not the practice of Eli Lilly and Company to imitate or duplicate the specialties of other manufacturers, as has been stated. When we have unwittingly done so we have never hesitated to accede to requests to either discontinue or modify the product. We abhor this practice which, in the early days of my connection with the pharmaceutical business, was a somewhat common practice, and is today on the part of a certain class of pharmaceutical houses, and we object to its practice upon us just as much as we do the idea of practicing it upon others."

Mr. Lynn's letter to Mr. Pfeiffer notifying him that the items complained about had been withdrawn by Eli Lilly and Company, is printed beginning at the bottom of p. 862.

He said further on this subject (p. 869):

> "I would like to say also that we took the first opportunity possible to make the changes and discontinuance that Mr. Pfeiffer indicated he thought should be done. * * * I would like to say further with reference to not all but several of these items named by Mr. Pfeiffer, that the formulas for the products were given us by Mr. Frank S. Hereth, who was in our employ as a pharmacist, this being the same Mr. Hereth who was one of the founders of the Searle & Hereth Company of Chicago. His coming to us was some time after he severed his connection with the Searle & Hereth Company. I think Mr. Pfeiffer was no doubt justified in his suggestion, and certainly it was our pleasure to do what he thought, and we admitted by our action, was the right thing to do, as has always been our attitude toward all competitors."

The facts in respect to these items were that Mr. Hereth was the originator of the formulas; that some time after selling the Searle & Hereth Company to the Pfeiffer Chemical Company, he came to work for plaintiff and made up these preparations from his own formulas, and this led to the placing of the items in plaintiff's list without any thought that Mr. Hereth had not the right to do this thing.

On p. 868 Mr. Lynn tells of the only other instances within his knowledge where plaintiff received any complaints from any source relative to infringing upon the rights of others.

While plaintiff makes many—probably hundreds—of preparations that are competitive with preparations made by other houses it does not make substitutes for preparations made by other houses.

Counsel for defendant questioned Mr. Fly, one of plaintiff's witnesses, in respect to an item generally understood to be a general line item "Elixir Viburnum Compound" found in plaintiff's list (p. 231, X-Q. 53-57) and asked the witness if he did not consider it a replacer for Hayden's Viburnum Compound." He replied in the negative, and then was asked why, and replied:

> "Because it is not alike in color, odor, or taste, the same as H. V. C. The formula of Hayden's Viburnum Compound is a hidden formula which no competing manufacturer knows nor are they in position to make a piece of goods so nearly like in its physiological action, as to take the place of H. V. C. I would say further that there is a piece of goods manufactured by William R. Warner that in odor, color, and taste is so nearly like Hayden's Viburnum Compound in its general ap-

pearance that it is used in a number of places as a substitute remedy for Hayden's Viburnum Compound."

He stated futher (X-Q. 57):

"I have stated in my previous answer that this item (plaintiff's) was distinctive in its odor, color and taste, so completely so that it could not be used as a substitute for H. V. C."

Every effort made by counsel for defendant to show that plaintiff has itself been guilty of the unfair practices which it charges against defendant only served to emphasize the high ethical standards which have always controlled plaintiff's business policy.

GENERAL LINE OR OPEN FORMULA PREPARATIONS

It is well known that there are hundreds of drugs and medicines listed in the United States Pharmacoepia and National Formulary that are manufactured by all pharmaceutical manufacturers and are known as "general line" or "open formula" items.

Counsel for defendant sought through the testimony of Mr. G. A. Pfeiffer, Mr. George M. Beringer, and others to show that in the Lilly catalogue are listed a large number of items corresponding in physiological action to items or drugs previously manufactured by other concerns. This presumably to base an argument that what defendant has been shown to have done in the instant case is common practice and therefore permisible.

Mr. J. K. Lilly, president of the plaintiff concern, and himself a chemist and graduate pharmacist, ex-

plained in respect to these items, that they are what is commonly termed "general line items" common to all houses, and showing clearly that none of them were intended for and could not well be used as substitutes.

Among the items is a natural, colorless mineral oil, which all pharmaceutical manufacturers sell, each under its own name, the competitor's name being "Aboline" and plaintiff's "Petronol;" and so on through the list, many of the items referred to are shown to be ordinary drugs made and sold freely by all houses but usually each house adopting a name of its own to distinguish its product from that of its competitors. This was true in the Lilly list, the Lilly products being identified clearly by Lilly names adopted for the purpose and in many instances made up by different formulas and of different physical appearance.

Mr. Lilly was subjected to a long cross-examination beginning on p. 900 and ending on p. 912, in respect to these items, answering freely all questions propounded and explaining clearly the differences between the Lilly preparations and the competing preparations.

The underlying idea in the questions seemed to be to have the witness admit that planitiff's preparation was of a similar nature and for a similar use to another preparation previously introduced and exploited by a competitor, and then to ask the witness whether or not the exploitation by the original house did not create a market for that class of preparations and if the plaintiff concern did not get some benefit of that market when it introduced its competing item. To all these questions the witness frankly answered "Yes."

In the instant case, it may be observed that plaintiff originated the formula for Coco-Quinine, that so far as its medicinal characteristics are concerned the defendant evidently has been able to substantially duplicate the formula, that plaintiff's exploitation of Coco-Quinine has undoubtedly created a large market and demand for a *liquid preparation containing quinine sulphate.* Plaintiff has also shown that this preparation can be produced and offered to the drug trade and medical profession in a large variety of colors and of a large variety of flavors so that physically it can be easily distinguished even "naked," as stated by the Court of Appeals, from plaintiff's product. If defendant wishes to honestly compete with Coco-Quinine the field is open for honest competition. Such competition would not excite the slightest opposition or complaint from plaintiff.

OTHER IMITATIONS

It is urged on behalf of defendant as an excuse for its conduct complained of, that other manufacturers have also imitated plaintiff's Coco-Quinine and put their imitations on the market. This point deserves but little attention. The evidence shows that a number of such preparations were discovered by defendant's organization and sample bottles thereof obtained and introduced as exhibits. It is shown by the testimony of Mr. Lilly (p. 896, Qs. 11-14) and Mr. Lynn (p. 855, Q. 8) that some of them had never been heard of by plaintiff's officials; that as to the others, with the exception of two or three, they were of comparatively no consequence being unsatisfactory as pharmaceuticals and giving plaintiff no particular concern. The

sales of such preparations must be compartively limited and probably confined to restricted localities.

While defendant's testimony shows that, at least, attempts had been made by others to put a Chocolate Quinine preparation on the market to duplicate Coco-Quinine at about the time or a little earlier maybe than when defendant achieved its success in this direction, yet such efforts were unknown to plaintiff until defendant's preparation had become known. (J. K. Lilly, p. 896, Q. 14.)

DIFFICULT TO DUPLICATE.

It is shown in the evidence that it is not an easy matter to duplicate a high class pharmaceutical preparation; that even after the ingredients and their proportions are known, the method of compounding, without which a perfect duplicate can not be produced, is difficult to discover, and therefore imitations or counterfeits of original pharmaceuticals which are satisfactory in use are not common (LaWall, p. 1272, Qs. 36-38; Lynn, p. 860, Q. 11).

Both of defendant's experts, Mr. Beringer and Mr. LaWall, were members of the Committee on the Revision of the National Formulary. Mr. Beringer was chairman of a subcommittee which, among other things, undertook to devise a formula for a chocolate quinine mixture to be standardized and published in the next revision of that work.

WITNESS LAWALL testified (p. 1269, Q. 24) that the Committee on Revision was appointed by the American Pharmaceutical Association, consisting of fifteen members, and (p. 1270, Q. 33) that this revision committee had considered placing in the National Formulary a preparation similar to Coco-Quinine. He noted

by a circular letter dated February 5, 1910, that the proposition to add such a preparation was approved by twelve of the fifteen members, all of the members who voted, and that this job was referred to Committee B of which Mr. Beringer was chairman. He referred to various bulletins from year to year until he came to Bulletin No. 75, dated August 15, 1914, which referred to the efforts to produce the chocolate quinine preparation and there he found the endorsement:

"No satisfactory formula yet devised."

This indicates that this committee of eminent pharmacists and chemists had the subject under consideration at least from February 5, 1910, until August 15, 1914, a period of more than four years and six months, without being able to produce a satisfactory formula.

The witness testified (p. 1271, Q. 34) that this endorsement "No satisfactory formula yet devised" meant that:

> "The subcommittee or individual to whom the preparation was referred for the construction of a satisfactory formula had not been able to combine the ingredients in a way that would make a preparation that would be pharmaceutically satisfactory."

Mr. Beringer on the same subject testified in reference to the National Formulary substantially as had Mr. LaWall (p. 1513, Qs. 43-48). He testified further (p. 1526, Q. 77) that the preparation of a formula for a syrup of quinine with chocolate was referred to a subcommittee of which he was the chairman, and that they tried out a number of formulas that were submitted and that they were not entirely satisfactory, concluding:

"So it remains the one subject on which that committee has not filed a final report and for which a formula has not yet been accepted."

He states further (p. 1527, Q. 78) that:

"It still remains as an unfinished business with the subcommittee B of which I was and am the chairman."

The witness was testifying on December 30, 1915. The subject was referred to his committee on February 5, 1910. His testimony, therefore, shows that after six years of effort his committee was still unable to report a satisfactory formula.

HOW DID DEFENDANT SUCCEED?

There are a number of references by witnesses throughout the record to statements made by defendant's salesmen to the effect that defendant had obtained the services of a chemist from the plaintiff's laboratories and by this means had obtained plaintiff's formula and thus was able to exactly reproduce plaintiff's preparation and for this reason the salesmen felt justified in assuring the druggist that defendant's preparation was exactly the same thing as plaintiff's Coco-Quinine.

For example see testimony of the following witnesses:

Blodau, p. 106, Q. 6; p. 108, Q. 20.
Dr. C. A. Noriet, p. 407, Q. 7.
H. M. Allen, p. 467, Q. 17.
E. B. Allen, p. 474, Q. 6.

In view of the difficulty experienced by Mr. Beringer and his committee as well as in view of other circumstances it seems *inherently probable* that such statements were true insofar as they relate to the source of the formula used by defendant.

These circumstances also probably explain the unsatisfactory character of the other preparations made by other manufacturers as imitations of plaintiff's Coco-Quinine as well as account for the success attending defendant's efforts in supplying a considerable part of the demand for plaintiff's product with its substitute Quin-Coco.

QUIN-COCO NOT DISTINGUISHABLE FROM COCO-QUININE

From time to time in the examination of witnesses, counsel for defendant attempted to show that, as a matter of fact, defendant's product Quin-Coco is not a duplicate of plaintiff's product, Coco-Quinine, that there are substantial differences in physical characteristics, particularly in appearance. It is true, of course, that there may be a difference in the identical shade of color. This is true as between two different batches of plaintiff's product, is probably true as between two different batches of defendant's product, and is probably true as between one batch of plaintiff's product and another bath of defendant's product. It is not true, however, that there is no regard paid by either manufacturer to obtaining a substantially uniform color and it is not true that there is ever such a difference between the shade of color of one batch and the shade of color of another batch, whether it be plaintiff's product or defendant's product, that any user, either physician or patient, considering them separately, could ever tell

the difference, although possibly an expert with the two preparations submitted together for comparison might detect a slight difference. That the similarity in color was so close as to deceive many retail druggists in the comparisons made of the two products by defendant's salesmen in their efforts to sell Quin-Coco is shown by abundant testimony.

If any further proof were needed of the fact, it is afforded by the testimony of defendant's distinguished chemical and pharmaceutical expert, Dr. Beringer himself.

After weeks of preparation and abundant opportunity for analysis, comparison, and all kinds of tests desired, this witness testified that he did not know of any other substance than chocolate or cocoa which might be used in a syrup preparation of quinine and serve to suspend the quinine sulphate. That chocolate is absolutely the poorest suspending medium of all the mediums used by Mr. Bibbins in his experiments is fully substantiated by testimony of disinterested chemists and pharmacists of undoubted qualifications, Dr. Beal, Dr. Caspari, Dr. Winton, and Dr. Hilton, all agreeing as to this.

After Mr. Beringer had spent nearly a day in putting his views upon record, he was asked a few questions on cross-examination relative to the similarity of defendant's preparation, Quin-Coco, to plaintiff's preparation, Coco-Quinine.

Beringer's Blunder

The witness was asked (X-Q. 134) if he had examined and analyzed plaintiff's Coco-Quinine. He admitted that he had made a partial examination of Coco-

Quinine in connection with his work with the national formulary. He was then asked if he had examined and analyzed defendant's product Quin-Coco (X-Q. 136). He admitted that he had. He was then asked (X-Q. 138) if he noticed any material difference in the two products. He answered:

> "There is some physical difference in the samples that I examined."

He was then asked (X-Q. 139) if they would be apparent to laymen. He replied that he believed they would be apparent to the ordinary user.

He was then asked (X-Q. 140) what differences he had in mind. He replied:

> "There is some little difference in the color which to me is quite distinct."

He was then asked which is darker (X-Q. 141). He replied:

> "The S. & H. Quin-Coco is darker. *It is distinctly* shown.

He was then asked if it was thicker (X-Q. 142). He replied:

> "No, I do not think it is any thicker. The samples I have examined seem to be of about the same consistency."

He stated that he made the comparison of the two preparations *at the time,* but did not discover any difference that would distinguish them as to taste (X-Qs. 144-145). He was then asked if he discovered any difference "in the appearance" (X-Q. 146). He replied:

"In the appearance, yes, I should say so. There is difference in the appearance."

Then followed this examination:

"X-Q. 147. Do you think a customer accustomed to using Coco-Quinine, if given a bottle filled with Quin-Coco could tell the difference?

"A. A critical customer could.

"X-Q. 148. From its appearance?

"A. My experience has been that customers in drug stores are quite critical today. A little difference in flavor or a little difference in shade of color is noticed."

Then to test the matter and give the witness, himself a distinguished chemist and pharmacist, who had so recently examined and compared these two preparations, an opportunity to prove the accuracy of his judgment, counsel for plaintiff took defendant's exhibits, Beringer Samples, bottles Nos. 12 and 13 (one containing Coco-Quinine and the other Quin-Coco), and after shifting them about in his hands, handed witness one of them with its label concealed, and asked the witness:

"X-Q. 149. Without observing the label, will you tell me which product is in this bottle?

"A. Will you let me see the other so that I can make a comparison?

"X-Q. 150. No, the customer could not compare them.

"A. All right. Then I am simply judging without a comparison of the two. I should say that this was the S. & H. Quin-Coco.

"X-Q. 151. Now, will you observe the label, and state what it is?

"A. Coco-Quinine, Lilly. That was without the two together. With the two together, I can tell the difference in shade very quickly."

Thus all that witness had previously testified to on this is shown to have been pure theory and of no practical value.

It will hardly be contended that any novice or ordinary user would be able to distinguish one preparation from the other when Mr. Beringer, recognized as one of the leading pharmaceutical chemists of the country, who had spent days and perhaps weeks in comparing these preparations and considering this subject, preparing his most elaborate and exhaustive answers (largely read from manuscript) to questions propounded by counsel for defendant (also read from manuscript), was unable to do so.

Mr. Beringer had already testified that in taste the two preparations were identical and he *proved* by his answer (X-Q. 150) that in color they are so nearly identical that even chemists of wide experience in pharmaceutical work, after exhaustive study and comparison at the immediate time, cannot tell one from the other.

It should be borne in mind that the bottle handed to the witness and which he wrongly identified, was one of his own samples (No. 13) introduced by his own testimony and a part of the identical preparation that he had been experimenting with, testing, and making his comparisons with.

As before stated, it is admitted that there is a shade of difference between the color of different batches of the preparation of each house. Witness Fritsch for defendant so testified in respect to defendant's product and it likewise appears of record in respect to plaintiff's product. This is due entirely to a slight difference in the color of different supplies of cocoa or chocolate used as obtained from time to time, although

both houses endeavored to secure chocolate of a standard shade of color. That defendant has succeeded, so far as the purpose of simulating plaintiff's "dress" for its product is concerned, in duplicating plaintiff's shade of color, is clearly proven by Mr. Beringer's testimony.

MEDICINE—NOT A FOOD

It should be borne in mind that the product in controversy is a *medicine* and not a *food* or a *confection;* that medicines are compounded to serve certain therapeutic purposes, and that the value of the medicine as a therapeutic agent is the sole consideration to which the scientist, who by his research and experimental work produces the preparation, or the physician, or the druggist, is directing his attention. The *color* or the *flavor* of a medicinal preparation is of no consequence when considering its value as a medicine.

Medicine is not prescribed because of its color or its flavor. Such suggestion would be considered a joke by any physician or any druggist. The contention, therefore, that chocolate, or any other coloring and flavoring medium, used in medicine, has any essential function, or has any "functional" purpose, must be seen to be ridiculous when the matter is viewed from the standpoint of plain common sense. In articles of food, chocolate may be and is an important element. Some articles of food can not be made without it. Not so with medicine.

Many medicinal agents are unpleasant to take even in the form in which they are administered. Quinine sulphate is a medicinal agent which but few people can take in its uncovered form. Because of this, it is commonly administered in capsules or pills. Some

people object to taking medicine in the form of capsules or pills, and others are incapable of taking it in such form. Quinine sulphate is perhaps one of the most extensively used drugs known to the medical profession, and for many years prior to the advent of Coco-Quinine the need of some means whereby this most bitter salt of quinine could be administered to patients in liquid form was recognized. No such means was discovered (notwithstanding the literature contains references to efforts made in this direction) until Dr. Eberhardt, carrying out the instructions of Mr. J. K. Lilly, conducted his experiments which resulted in the production of the satisfactory formula for Coco-Quinine.

"SUBSTITUTE"—SIGNIFICANCE OF

Counsel for defendant seem to contend that the word "substitute" signifies legitimate competition and the words "passing off" are the only ones that signify fraud. Counsel's purpose in so arguing would seem to be that the Court in reading the testimony, may attach to the word "substitute," when used by witnesses, the significance of *legitimate competition* and only consider their testimony to suggest unfair competition when the words "passing off" are used.

The words "substitute" has but one significance in the drug trade, and that is one that is odious to good morals and good ethics. A "substituter" in the drug trade is not regarded as an ethical druggist and the term "substitution" is never used in the drug trade except in the sense of unfairly passing off to the customer, or by filling a prescription with, some substitute preparation in place of the one called for or pre-

scribed, without advising either the customer or the doctor.

"Substitution" is considered dishonest in the drug trade and while, contrary to the claims of counsel for defendant, its practice is quite general and a considerable proportion of the retail druggists indulge in it, it is only because of the inducement to make more money and the fact that many of them are practically driven to it by the practices of their competitors and the persuasions of the manufacturers who hold the lure of larger gain before them.

Throughout all of the record and the testimony of the numerous witnesses examined, there is not a single instance of a witness using the term "substitute" or "substitution" in any other sense than as synonymous with "passing off." In fact, the distinction which counsel for defendant would have the court recognize in this case is one that is seldom recognized by the laity in any branch of business but is chiefly recognized, if at all, in the arguments of counsel or the decisions of the Courts in defining the lines of distinction between fair and unfair trade.

It must then be understood, that in all the testimony the term "substitute" is used by the witnesses as synonymous with the term "passing off" and that this means giving to the physician, to his patient, or to the customer coming to the drug store and asking for Coco-Quinine, defendant's product, Quin-Coco. This is giving to the customer a thing different from the thing asked for; and this is fraudulent substitution and not honest competition.

Throughout the record counsel for defendant frequently interrogated witnesses respecting their views on substitution and their understanding of what the term "substitution" meant.

Witness Thorburn, chief chemist of the Pitman Moore Co., manufacturing pharmacists and a competitor of both plaintiff and defendant, was called as a witness for plaintiff and on cross-examination by counsel for defendant testified (p. 34, Qs. 30-32) that a "substitute" is "something intended to entirely replace the article that is already on the market;" that it is possible to "furnish an article intended to replace the successful one from a *medicinal* standpoint without intending to duplicate the successful article in every particular, pharmaceutically or in regard to the *physical characteristics* of the preparation." He was then asked:

> "X-Q. 32. If two preparations are pharmaceutically the same, would the mere change in color of one by any important coloring matter take it out of the class of substitute? A. I think it would. Such a change would make it impossible to deceive a purchaser into thinking he was getting one article for the other."

This seems to be a very fair statement of the general understanding of those engaged in all branches of the drug business and also the physicians as to what a "substitute" is. A substitute preparation, therefore, is one that can be used by the retail druggist in the place of an original preparation made by another house and the purchaser be deceived into thinking he is obtaining said original.

See also testimony of the following witnesses:

> Hooper, pp. 18-19, Qs. 20-23; p. 24, X-Qs. 92-93.
> Dr. Perkins, p. 133, X-Qs. 8-10.
> Chestnutt, p. 149, X-Qs. 17-18.
> Persell, pp. 198-200, X-Qs. 51-67.

These are but examples of similar testimony of many witnesses throughout the record.

"CRIME" OF SUBSTITUTION

It need not be stated that the relation between patients and physicians, and physicians and druggists is an intimate and confidential one, and that it should be respected and protected to save the public from being imposed upon. Even in the case of medicines the formulas of which have become public and may be found in the lists of formulas published for the guidance of physicians and druggists, it is recognized as the duty of the druggist to fill prescriptions according to the name designated on the prescription; and defendant does not dispute that when Lilly's product is called for by anyone it is "a crime" (as testified by Witness Fly, Q. 11, p. 226) to fill that prescription with the product of the defendant. But defendant asserts that everything short of this is proper; that he may copy the formula of the plaintiff not only in the essential matters recited by the court, but in the non-essential details by which the plaintiff's product has become known and is identified to the physician and to the patient. For plaintiff's product would not be recognized as distinctive if comprising simply the combination of quinine sulphate and yerba santa—the essential ingredients, one the therapeutic agent and the other the agent for masking its bitter taste—in simple syrup. Some identifying means had to be employed to distinguish this new compound and to that end the plaintiff employed chocolate. This was not used to disguise the bitterness of the quinine, for that was the function of the yerba santa, an essential function. It was done and done only to impart a distinc-

tive color and flavor though, as the record shows, there were available to the plaintiff many other substances, any of which might have been used to impart a distinctive color and desirable flavor, some of which were superior even to the chocolate or cocoa, as shown by the testimony of celebrated experts reviewed hereinafter.

WITNESS FLY, testifying for plaintiff (p. 226, Q. 11), stated that he was for many years engaged in the business of a registered pharmacist and for four years occupied the position as president of the Mississippi Board of Examiners and served a term as president of the Mississippi Pharmaceutical Association. He expressed his opinion of substitution as follows:

> "As a man actively engaged in the filling of prescriptions I felt that the prescription work was a sacred trust, based upon confidence and any departure from the accuracy of dispensing was considered entirely out of my prerogative and, as history will bear me out, the slogan that I used in connection with my business was 'Substitution considered a crime.' "

He explained (Q. 13) the reason why he considered substitution a crime, as follows:

> "For the reason that in dispensing medicine under the direction of an attending physician, I thought in presuming to substitute one item for another I was taking upon myself a great responsibility and one that did not come within my province, feeling that in presuming to substitute one item for another I might possibly be undoing all that had gone before in the way of diagnosis by the physician who is the legitimate source for the prescribing for his patients."

Mr. Fly has in these two answers very clearly and forcefully stated why substitution is a "crime" and why it should be prevented, particularly in a case such as this where the preparation goes "naked" to the patient, bearing only such label on the package as the druggist may choose to put there, and particularly when it can be prevented by merely requiring, as the Circuit Court of Appeals has done, that defendant use some other substance than chocolate to color and flavor its preparation.

SUBSTITUTION UNETHICAL AND DISHONEST.

WITNESS THORBURN, whose testimony is again referred to because he is an official of a competing house of both parties to this case and entirely unbiased and fair, testified (p. 38, RDG. 69) that it is not considered good morals or good business ethics for one drug manufacturing concern to place upon the market a preparation which can be used as a replacer or substitute for a successful specialty of another concern, and that his house (the Pitman-Moore Company) does not follow such practices (Q. 70) for the reason (Q. 71) that it does not help the reputation of the house and is not directly profitable and does not win support of the customers, concluding:

"There is a decided sentiment among our customers against this practice."

The witness further testified (p. 36, X-Q. 49):

"As long as I have been connected with the drug trade there has been a protest against such duplication and I do not think that it has been as common to duplicate these preparations as it has been to *make new ones.*"

And further, as to the extent of the practice in the drug trade (X-Q. 52), he testified:

> "Considering the number of preparations that had been introduced into medicinal use, I do not think that the drug trade generally has made a practice or did it at any time make a practice of duplicating a large number of these preparations in such a way that the new article could be sold for the old and the purchaser deceived."

Mr. J. K. Lilly was asked (p. 44, Q. 13) to state the ethics of business among reputable concerns relative to placing upon the market preparations of similar character. He replied:

> "Many manufacturers in the United States scrupulously avoid duplicating, in a manner that might deceive, the preparations of other manufacturers, especially those designated as specialties. This practice is generally considered among manufacturers as good morals and proper ethics and is considered perfectly legal as long as it does not tend to create a monopoly or restrain trade. Other manufacturers make it a practice to duplicate as nearly as possible preparations of others in such manner as to deceive, rendering it possible to substitute the one preparation for the other.

The witness further testified (p. 45, Q. 15) as to the practice of manufacturers in duplicating preparations:

> "What is known as general pharmaceuticals, being common property, all manufacturers feel perfectly free to make and market them without

any restrictions whatsoever. When one manufacturer, however, creates something new and original, expending time and money in creating, introducing and establishing same, many other manufacturers do not feel that they have any legal or moral right to duplicate the preparation precisely in color and flavor or general nature and undertake to secure trade that has been created by the originator. They, therefore, refrain from such practices. *This does not interfere in the least with their creating something entirely different yet competing in the same field of usefulness.*"

ERNEST G. SWIFT, secretary and general manager of Parke, Davis & Co., another large competitor of both plaintiff and defendant, testified (p. 64, Q. 7) that his house has not placed a preparation on the market like Coco-Quinine because they have "respected what they believe to be the priority rights of Eli Lilly and Company."

The testimony of Witness Winchester (p. 112, Q. 9) shows that Sharpe & Doehme, another large pharmaceutical manufacturing concern and a competitor of both parties to this suit, refused to consider putting a preparation on the market which could be substituted for plaintiff's Coco-Quinine.

FRANK S. HERETH, the former president of Searle & Hereth Company, the label of which concern is used by defendant on its packages of Quin-Coco because, as testified by Mr. Pfeiffer, they considered that after purchasing this concern they had a right to use the name "Searle & Hereth" as they might deem to their best advantage, testified (p. 353, Q. 11) as follows:

"Q. 11. Do you mean that the Searle & Hereth Co. declined to make any preparations which

would compete with preparations manufactured by Eli Lilly and Company? A. No, I do not mean this, since we made many preparations that were in a sense competitors, but I regard the form in which this preparation was made as original and felt that we should not make a preparation similar to it in composition and appearance *in order that it might be used as a substitute for 'Coco-Quinine.'*"

This testimony by Mr. Hereth shows the policy of the Searle & Hereth Co. under his management, which no doubt accounts for the reputation acquired by that concern during its comparatively brief existence prior to its acquisition by the Pfeiffer Chemical Company, as an ethical house entitled to the confidence of the drug trade and medical profession. It also accounts for the adoption of the Searle & Hereth label for Quin-Coco by the officials of the defendant concern, for it no doubt had the effect of impressing the retail druggist with the argument that the preparation had merit as a pharmaceutical.

Dr. E. C. Fisher, of Richmond, Virginia, a witness for plaintiff, defines the attitude of the medical profession toward the practice of substitution. He testified (p. 325, Qs. 11-12) as follows:

"Q. 11. How is substitution by the druggist regarded by the medical profession in this community? A. We do everything that we can to prevent it, and if we find a druggist substituting on us we try to keep other prescriptions from going there.

"Q. 12. Do you regard it of importance to your practice or to your patients that your prescriptions be filled with the drugs you specify, and if you do, why? A. It is important to both doctor

and patient, for if the druggist substitutes we don't know what results are to be derived from the prescription, as we expect definite results from each drug used in every prescription."

Dr. Perkins, of Lake Charles, Louisiana, a witness for plaintiff, also testified (p. 132, Q. 7):

"Q. 7. How do you feel or what is your opinion of the practice of substitution and what are your reasons for your opinion? A. I always think that substitution should be condemned because a physician is not always in a position to know what drug is being substituted and whether it has the same medical value as the original which he intends to prescribe."

For further views respecting the ethics of the drug trade and medical profession on this question, see testimony, among others, of the following witnesses:

Hooper, p. 27, X-Q. 108.
Merithew, p. 61, X-Q. 18.
Sand, p. 104, X-Qs. 14-16.
Blodau, p. 108, X-Qs. 17-18.
Scott, p. 120, X-Q. 52.
Bowden, p. 139, X-Qs. 12-13.
Chestnutt, p. 149, X-Q. 18.
Schaeffer, p. 157, X-Q. 28.
Barnes, p. 181, X-Qs. 18-19.
Dr. Gargrave, p. 351, Q. 6.

COMPARATIVE VALUE OF TESTIMONY

Plaintiff has not relied upon the testimony of its own officials and employees for proof to support the allegations of its bill, but has introduced the testimony of an unusually large number of witnesses having no

financial interest in the plaintiff concern, no relationship to the officials of plaintiff concern, and no interest in the outcome of the litigation, in an effort to prove beyoud doubt that each and every allegation in its bill of complaint is well founded in fact. The Circuit Court of Appeals found the proof sufficient.

Defendant's proofs consist almost entirely of denials by its officials and its employees of the testimony submitted on behalf of plaintiff. Defendant introduced the testimony of Mr. Beringer and Mr. LaWall as chemical experts, in an endeavor to support the theory that chocolate is an ingredient essential to the manufacture and sale of the medicine; the testimony of Mr. Mulford and Mr. Stone to show that H. K. Mulford & Co. put out a chocolate quinine preparation in 1904—four years after the plaintiff preparation was on the market; the testimony of U. S. McClellan and O. G. Salb to show that John G. Milliken & Co. began making quinine preparation in July, 1905; the testimony of E. F. Helbig to show that the Meyer Brothers Drug Co. of St. Louis began making a chocolate quinine preparation in 1905; the testimony of T. K. Boesch, a retail druggist of Philadelphia, to show that retail druggists carry in stock preparations of various manufacturers similar in composition which can be used interchangeably; the testimony of Henry C. Blair, a retail druggist of Philadelphia, to show that he at one time made up a chocolate quinine mixture for Dr. Samuel K. Ashton in his drug store, but did not know whether it was used or not and that the quantity was about four ounces; the testimony of W. C. Kerstann to show that the Webster-Warnock Chemical Company of Memphis put up a chocolate quinine mixture about 1909 or 1910. Aside from these witnesses, whose tes-

timony is comparatively unimportant in its bearing upon the real issue, all of the testimony for defendant was by its own officials and employees.

This testimony consisted, as before stated, very largely in merely denying the allegations of plaintiff's witnesses.

Mr. Henry Pfeiffer, for example, in his testimony uses such statements as "I did not;" "Not true;" "I can not say;" "I do not recollect," etc., etc.

Mr. Kelton had testified that Mr. Henry Pfeiffer had discussed with him the subject of making Quin-Coco as a preparation to sell against Lilly's Coco-Quinine and Mr. Pfeiffer was asked if he ever discussed the subject of Quin-Coco with Mr. Kelton (p. 1245, XQ. 111). He replied:

"Not that I know of."

When asked what he would say to the salesmen about the "Blue List" in giving the salesmen instructions, he replied (p. 1246, XQ. 118):

"I do not recollect."

When asked what he instructed his salesmen about their chief duty, he replied (XQ. 119):

"Get as many orders as they could."

Mr. Merner denied everything that Mr. Thurman had said in reference to his conferences with Merner and what Merner had said to him. When he was asked by his counsel how and when Thurman's employment was terminated (p. 1290, Q. 85) he said:

"I do not remember the exact year—"

But then his counsel called his attention to Thurman's testimony as to the date when said employment terminated and he unhesitatingly finished his answer by saying:

"But I think it was in December, 1912."

Counsel for plaintiff had the Examiner note at this point that the witness' attention was called to Thurman's testimony by Mr. Rawle and that Thurman's statement of the fact was accepted by the witness in making his answer. He did not even remember the year, but without hesitation accepted Thurman's statement not only as to the *year,* but as to the *month* of the year. The readiness with which Mr. Merner accepted Mr. Thurman's statement as to one fact shows that he at least had confidence in his veracity. This casts a grave doubt upon the value of Merner's denials of the other things Thurman had said, particularly when it is considered that Thurman was a disinterested witness, under no obligation to either side, while Merner was one of the chief officers of the defendant concern.

Defendant's sales manager, Ritayik, after denying all of the things alleged by plaintiff's witness as to his conduct in the sale of Quin-Coco, testified (p. 1309, XQs. 94-95) that he never heard one of his salesmen represent to a retail druggist that Quin-Coco could be dispensed when Coco-Quinine was called for and, in fact, that he *never heard one of his salesmen mention Coco-Quinine to a retail druggist.* The "inherent improbability" (to borrow a phrase from counsel for defendant) of this testimony does not need to be commented upon.

And so throughout defendant's testimony will be

found many of these vehement protests by the defendant's salesmen that they did not do the things charged against them by plaintiff's witnesses. But standing against their testimony in every case is the testimony of two or more disinterested witnesses, while their testimony in each instance is given not only as an interested witness, an employee of defendant, but after full and complete instructions as to the character of the testimony desired by defendant to defeat plaintiff's case and after many months since the receipt of Exhibit O'Connell Letter No. 4, by which they obtained such instructions and in which they were requested to obtain the evidence required.

Witness Fritsch who, on cross-examination, admitted everything that Mr. Groves had said about the experiments in the Philadelphia laboratories in an effort to produce a preparation like Lilly's Coco-Quinine, with particular efforts directed to duplicating its color, except the date when these experiments were made, admitted that his statement in reference to dates was largely controlled by a conversation with his wife and upon information he obtained from her as to when they took a certain trip to Atlantic City (p. 765, Qs. 16-19).

He admitted that he talked with Mr. G. A. Pfeiffer about it (p. 768, Qs. 37-38) and that this was after the Pfeiffer Chemical Company came to Philadelphia, and he stated (p. 767, Q. 36) that Mr. George Martin told him to make the experiments.

"SALESMEN'S CONFIDENTIAL"

Counsel for defendant make strenuous protest against every suggestion that defendant has been guilty of anything unethical or wrong. As showing

this they point with great satisfaction to what they term the "Salesmen's Creed" printed on the last page of defendant's "Salesmen's Confidential," which, in other words is the confidential price list of the house used by the salesmen. They seem to argue that with such creed defendant could do no wrong.

This creed has been printed in all issues of this confidential price list since 1911, according to the testimony of witness Haffa (p. 1546, Q. 6).

Mr. Haffa could not tell the name of the author of this "Creed" but stated that it was printed, as appeared on p. 60, by courtesy of Sheldon University Press, Libertyville, Illinois.

Evidently someone saw this literary gem and thought it would look well in the price list and had it printed there. The salesmen were nearly all made to testify that they studied this confidential carefully and read the creed, and followed its teachings. None of them, however, on being asked respecting the particular admonitions of the creed, could specify except that it told them to be honest.

The former Warner salesmen who testified as witnesses for plaintiff did not seem to recall very clearly very much about the creed.

That this creed is all camouflage is evident from a reading of the numerous salesmen's letters sent by defendant to its travelers.

The letters may be searched in vain for any admonitions respecting honesty, ethical practices, refraining from mentioning competitors, etc., as outlined in the "Salesman's Creed" and about which counsel for defendant has so much to say in his examination of defendant's salesmen while they were testifying as witnesses.

Please note Kelton letter No. 31 on p. 614 exulting over a nice order for "Vogue," one of the Pfeiffer Chemical Company's substitute perfumes, as will appear in the evidence. Also Kelton letter No. 36, p. 617, congratulating Mr. Kelton on a fine order, including a gallon of "Quin-Coco." That Mr. Kelton was a pretty good salesman is indicated by letter No. 40, on p. 619.

Letter No. 42, p. 620, begins with the significant headline: *"What is more welcome than orders."*

In letter No. 44, p. 624, 2d and 3d paragraphs, are found these significant suggestions:

"Selling goods is your business."

"Proper suggestion is the greatest selling force known."

Mr. Henry Pfeiffer admonished Mr. Kelton to "go for your best and most doubtful trade first" when he found that the salesman of a competing house was also in Memphis (Q. 28, p. 626).

Mr. Kelton refers to the fact that Quin-Coco was the best seller he had in the pharmaceutical line *"after I once introduced it to the trade,"* noting that in one day at Dyersburg, Tenn., he sold twenty (20) gallons in five orders. This was on November 13, 1909, and Dyersburg was a town of only 7,000 population (Q. 34, p. 628).

Mr. Kelton claimed (Q. 36) that he used Mr. Garvin's statement in regard to the quantity being manufactured as an argument when he found a man who was not a buyer of Quin-Coco "to show him that we were actually *knocking the eye out of Eli Lilly & Co. in their sales of Coco-Quinine.*"

Note also the O'Connell exhibit letters, the same being another series of salesmen's letters from defendant to its travelers printed on pp. 980-1016. These

letters also contain many statements urging the travelers to make diligent effort in pushing the sale of many items on their lists designed to be substituted for original items of other houses. They can be searched in vain for any reference to the salesmen's "creed" or any admonition to follow the teachings of the salesmen's creed printed in the back part of the confidential price list. On the contrary, many expressions are found, such as these:

> "Make hay while the sun shines." (Letter No. 23, p. 1007.)
> "Seed that grows." (Subject of Letter No. 24, p. 1009.)
> "All together, let's reap while the reaping's good." (Letter No. 30, p. 1015.)

The only reference found in any letters to the salesmen's confidential is contained in O'Connell letter No. 29 (p. 1015) which tells the salesmen that the house is revising its "salesmen's confidential" and wants suggestions. This letter states:

> "We are revising Salesman's Confidential. This booklet is intended for the salesman exclusively, and we want the new edition to be perfect. To help make it so, send us your suggestions of the additions and changes you would make if you were selected to superintend the revision.
> "The purpose of the Salesman's Confidential is to give information, which taken in connection with the Epitome, enables you to know your line and quote prices intelligently and quickly. The Salesman's Confidential should be:—
> 1. Neat and legible.
> 2. Simple and concise.
> 3. Specific and clear.

4. Easy and quick of reference.
5. An answer to every question, either a salesman or customer might or will ask.

"Your suggestions will help make it so. Send them in at once. We are now revising.

Truly yours,

WM. R. WARNER & Co.,
G. A. PFEIFFER, *Treas.*"

It is significant that in this letter sent out to its travelers in September, 1916, after this case had been running for a year and nine months, no mention was made of the alleged standard of morals, "the Salesman's Creed," and no suggestion made of the purpose of this creed in the Confidential.

The conclusion can not be avoided that the efforts of counsel to establish a code of ethics for their client and give it good character in this proceeding, by resorting to this pretext of the "salesmen's creed" is a dismal failure. Except for the fact that it, the effort, seemed to be seriously undertaken and seriously pursued during the taking of the latter part of the testimony (nothing was said about it during the first stages of this proceeding), it would be considered but little more than a joke, particularly in view of the fact that the record abounds with proof of practices by defendant so entirely out of harmony with the spirit of its "Salesmen's Creed."

LACHES.

Defendant has sought throughout the record to make it appear that plaintiff has been guilty of laches by not more promptly beginning this action, arguing because defendant was allowed to proceed with its practices complained of for several years, that plain-

tiff acquiesced and is now estopped from asserting its rights.

This is contrary to the controlling rule of law and probably will not be urged seriously but the history of the matter may be briefly reviewed.

Mr. G. A. Pfeiffer testified (p. 1196, Q. 5) that Quin-Coco was first marketed in the fall of 1906 by the Pfeiffer Chemical Company, and (Q. 11) that since August 1908 Wm. R. Warner & Co. have been substantially the sole distributors.

It is true that Quin-Coco was listed in the Pfeiffer Chemical Company 1906 catalogue, but there is no evidence of any sales during that year, and Mr. Pfeiffer himself was not able to state (p. 1226, X-Q. 207) that any was made and sold during the fall of 1906; and (X-Q. 208) that he thought the preparation was in marketable form in the fall of 1906 but was unable to state positively, and (X-Q. 209) he could not state how much was sold during either 1906 or 1907, answering by comparison that there was less sold then "than we sell now."

The first evidence of any sale of Quin-Coco is in the testimony of witness Kelton who was employed by defendant and the Pfeiffer Chemical Company from 1901 to 1912. Mr. Kelton's own testimony was that this product was put on the market in 1907 and his list of duplicate orders (printed on pp. 568-583) shows that his first order for two pints of Quin-Coco was dated January 23, 1907, the next March 14, 1907, for five pints, and that during the year 1907 he sold ten gallons amounting to $39.15. As Mr. Kelton was acknowledged to be one of the best salesmen handling the product and covered a large territory, which was peculiarly a quinine consuming territory,

it is fair to assume that the sales of the product during 1907 were not so extensive as to be likely to be brought to the attention of the executive officers of the plaintiff concern.

Mr. C. J. Lynn, plaintiff's general manager testified (p. 870, X-Q. 19) that he first heard of Quin-Coco through reports from their salesmen, stating that the only way he could locate the time is that it was not long before "we began remonstrating with Messrs. Wm. R. Warner & Co. over the fact that they were offering the product. That, I think, must have been in 1909, probably the early part."

He explained further (X-Q. 20) that while it might have been put on the market earlier, it would not likely have been brought to his attention until its sales were actively pushed.

Mr. J. K. Lilly, president of the plaintiff concern testified (p. 895, Q. 9) that he could not remember that Quin-Coco was called to his attention prior to 1909, and (p. 896, Q. 14) that this action was brought against Wm. R. Warner & Co. because Quin-Coco was the oldest imitation preparation within their knowledge and that it secured the largest volume of sales.

It is shown that during the fall of 1909 and the first part of 1910 certain correspondence passed between plaintiff and defendant and certain interviews were held, the purpose of which on the part of plaintiff's officials was to protest against the manufacture and sale of Quin-Coco by defendant and induce defendant to discontinue such manufacture and sale by friendly conference and discussion, if possible. That plaintiff at all times insisted upon its moral right to complain of the practices by defendant in marketing its Quin-Coco to supply the demand which plaintiff had created

for Coco-Quinine is clearly apparent and cannot be denied. The testimony shows, however, that neither Mr. Lilly, the president, nor Mr. Lynn, the secretary and general manager of the plaintiff concern, was at that time advised that a legal remedy for the wrong existed.

Mr. Lynn testified (p. 859, Q. 10):

> "At that time, and for some time afterwards, we had no knowledge of the fact that we had any redress at law, and so confined our efforts to secure relief to persuasion by letter and personal interview."

It is thus shown that there is no basis in fact for the assertion that plaintiff rested on its rights. With reasonable promptness after learning of defendant's product, it protested and took up negotiations seeking to obtain from defendant a recognition of its rights in a peaceful and friendly manner. However, these efforts were exhausted without result, and the practices of defendant continued notwithstanding the protests until the situation became extremely aggravating, then plaintiff sought legal advice and promptly thereafter, following said advice, sought legal redress.

But it is urged on behalf of defendant that because Mr. Lilly in his letter of August 31, 1909 (p. 1214) urged defendant to make its price to the retail trade to correspond with plaintiff's price, the right by plaintiff to make and sell Quin-Coco was not denied.

In Mr. Pfeiffer's reply (p. 1215) to Mr. Lilly's letter it will be noted that he says "we admit that Coco-Quinine was entirely original with your house."

In Mr. Lilly's reply to Mr. Pfeiffer, dated October 6, 1909 (p. 1216) the writer says:

"Coco-Quinine was so entirely original with us and such a radical departure in the way of quinine preparations that we have felt that we were entitled to full consideration for it in the same manner that we have always endeavored to consider the rights of others in original, novel preparations. All reputable houses except yours have tendered this consideration, and we were in hopes that you, in the light of our desire to work together to our mutual advantage, would at least consider our rights in the premises so far as not to cut under our prices."

Again, in Mr. Lilly's letter to Mr. Pfeiffer, dated January 11, 1910 (p. 1217) he urged that defendant's course in selling Quin-Coco was in violation of one of the fundamental principles of the Homilia Club, stating that "If this club means any one thing more than another, it means that members will not attempt to build up a business at the expense of a competitor."

It should be explained that the Homilia Club was an organization of manufacturers of pharmaceutical products finally developing into what is now the American Pharmaceutical Manufacturers Association, the purpose being to meet from time to time and discuss matters of interest to the industry and to adjust differences respecting conflicting trade rights where possible. Among other things, each member was allowed to register its trade names for its products and it was at least an implied understanding that each member would respect the trade rights of the others in so far as trade names for its products were concerned and the placing upon the market of preparations which might be used by the retail druggists as substitutes for original and novel preparations put out by other members. Legitimate competition found no objection, but

only those practices which led to "substitution." In other words, the purpose was to raise the ethical standards of the drug trade and to establish a moral standard which would make the practice of substitution unpopular. Nothing in the plan sought to restrict the right of any manufacturer to bring out a medicine as a competing item with any original medicine made by another so long as in name and appearance it was so distinguished from the other as not to be a mere "substitute" therefor.

It will be noted (p. 1221) that under date of March 7, 1910, Mr. Pfeiffer notified Mr. Lilly that he was resigning from the Homilia Club; presumably because he did not find it profitable to live up to the moral standard prescribed by the club, particularly in respect to the recognition required as to the trade rights of the other members.

But it is said that because Mr. Lilly asked Mr. Pfeiffer to raise the price of Quin-Coco, so that it would correspond with plaintiff's price for Coco-Quinine, he recognized the defendant's right to manufacture and sell. In answer to this it may be said, first, that Mr. Lilly, as explained in the testimony by both himself and Mr. Lynn, had not taken legal advice and did not realize that they had any legal redress. Moreover, he desired, as would any other high class business man, to adjust the matter amicably if possible.

However, it does not require an exceptionally astute mind to realize that the request made by Mr. Lilly of Mr. Pfeiffer, if complied with, would have effectually removed Quin-Coco as a substitute for Coco-Quinine in the drug trade, for no druggist would buy and use a *substitute* for *any* preparation if he could buy and use *the original* at the same price. All druggists know

that substitution is regarded as unethical and dishonest. Those who yield to the temptation yield solely because of the larger profit to be obtained by such practice. For this reason, as any one can see, except for the lower price of Quin-Coco, or any other substitute pharmaceutical, there would be absolutely no sale for it in the retail drug trade. Therefore while Mr. Lilly's request was couched in friendly and gentlemanly terms, nevertheless, the inevitable effect of what he asked to be done, was to remove Quin-Coco from the market.

PLAINTIFF'S RIGHTS.

It is believed that in a case such as this where the product goes from the manufacturer to the consumer through the medium of a retailer, the retailer receiving the product from the manufacturer in large or bulk packages and dispensing it to the consumer in small packages without the manufacturer's label,—in this case in small prescription bottles, with the usual drug store label on which the druggist may write any name he pleases, —that the manufacturer is entitled to protect itself as well as the public against the substitution of an imitation product for the original by incorporating in said product itself some non-essential substance to give to said product a distinctive color or a distinctive flavor, or both, in order that the origin of the product may be identified. It is particularly important in the case of a medicine, where the health or even the life of the consumer is at stake, as well as the reputation of the physician and of the manufacturer, that such a practice be approved and the right of the manufacturer to the exclusive use of such identifying substance in his medicine be recognized.

It is shown by abundant testimony that in the instant case plaintiff was not satisfied to depend upon the common coloring substances, Carmine or Cudbear, but wished to adopt something for the purpose entirely different from what anyone else had used and finally decided upon chocolate or cocoa. Coco-Quinine, as has been stated before, and proved by the testimony of many witnesses, was the first liquid medicine in which chocolate or cocoa was used for a coloring or flavoring medium. It would seem that if the drug business could get along without chocolate for such a use for all time prior to the year 1900, no great hardship will be imposed upon the public or upon the business by recognizing plaintiff's exclusive right to its use in so far as this preparation is concerned.

Mr. C. J. Lynn stated what would seem to be a very fair and reasonable conclusion as to the rights of the originator of a medicinal preparation in the matter of protection (p. 874, X-Q. 36) when he said:

> "If he gives it something to distinguish it from other similar preparations, something that is non-essential to the product itself, I certainly think the manufacturer should be entitled to protection to the extent that the peculiar appearance or characteristic of his product should be respected."

AUTHORITIES.

In the Court below plaintiff urged that in the case of *Coco-Cola Company vs. Gay-Ola Company,* 200 Fed. 720 (Circuit Court of Appeals, Sixth Circuit), the issue was very similar to that of the instant case, and that the conclusions reached there justify plaintiff's contentions here. In that case the Gay-Ola Company was selling to the drug stores its product in bulk packages to be dispensed at the soda fountains to customers, and it was shown that in many instances the defendant's

product was dispensed when plaintiff's product was called for, either by its exact trade name or one of the other names commonly accepted as indicating Coca-Cola.

In considering this decision as applied to the instant case, the District Court, referring to the coloring substance, caramel, stated that there is no claim that it serves any other purpose in the compound except to give color and distinguished the instant case from that on the ground that the flavor of chocolate is obtainable from no other substance. The District Court overlooked the fact that caramel (a compound of butter, burnt sugar, etc.) does impart, a flavor to whatever it is used to color and a distinctive flavor, and moreover, this fact was recognized in the decision itself, for the Court said of that defendant's product:

> "The product is identical both in appearance and taste."

The Gay-Ola case is, in fact, directly in point, and the court of the Sixth Circuit shows that it rests upon prior decisions which present the fundamental principles sustaining the rule of restraining defendants engaged in practices similar to those of the defendant here. For example, that court cited *Garrett, et al., vs. G. H. Garrett & Co.*, 78 Fed. 472, where, at page 474, it is said:

> "Whether retail dealers were advised that they could sell the snuff as 'Garrett's Snuff' to their customers as and for the snuff manufactured and sold by complainants, and whether it was intended that those customers should be thus deceived is in dispute. Affidavits for complainants sustain the charge, and affidavits for the defendant deny it.

> But that the effect was to impose snuff manufactured by the defendants upon purchasers from retailers as 'Garrett's Snuff,'—that is to say, as snuff manufactured by complainants,—is, we think, too well established to be doubted; and we were fully impressed that it was the intention of the defendant company, by the use of the name 'Garrett,' to appropriate the good-will and interfere with the trade of the complainants."

Again at page 476 in the Garrett case the court said:

> "It is not to be credited that the imitations were unintentional or accidental. It is not claimed that the packages of snuff on which they were placed were put on the market with the intent to deceive the retail dealers who were supplied by defendant. That would have been impracticable. The claim is that the snuff was of inferior quality, and sold at prices below complainant's prices, with the expectation that the retail dealers, who knew what they were buying, would sell it to their customers as 'Garrett's Snuff,' and at the price of the genuine article thereby reaping a larger profit. That was the lure, and it was of the sort to be successful in the great majority of instances."

Likewise in a case where the Court of Appeals of the Sixth Circuit found that because of a deception of the public by the name used by both parties, relief could not be granted, nevertheless at page 816, in *California Fig Syrup Co. vs. Frederick Stearns Co.*, 73 Fed. 812, the Court (Taft, Lurton and Hammond), said:

> "But it is well settled that, even if the complainant is using something to designate its articles which it can not claim to have the exclusive right to use as a trade-mark, yet, if it can show to the court that the defendant is selling an article like the complainant's in such a way as to induce the public to believe that defendant's article

is the complainant's, and that it is doing this intentionally and fraudulently, the complainant may have the relief of a court of equity by injunction to prevent such piracy. Thus in this case, even though 'Syrup of Figs' is such a descriptive term that it can not be used as a trade-mark, yet, if the defendant here put its medicinal preparation up in packages ornamented and dressed so as to be a colorable imitation of the complainant's package, with the intention of misleading the public into the purchase of the defendant's article as the complainant's, then undoubtedly the defendant might be enjoined from thus attempting to palm off its article as the article of complainant. Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625; Lawrence Manuf'g Co. v. Tennessee Manuf'g Co., 138 U. S. 537, 11 Sup. Ct. 396; Croft v. Day, 7 Beav. 84; Holloway v. Holloway, 13 Beav. 209; McLean v. Fleming, 96 U. S. 245; Wotherspoon v. Currie, L. R. 5 H. L. 508; Thompson v. Montgomery, 41 Ch. Div. 35-50.

In this case there is evidence tending to show that the defendant is attempting to appropriate to itself by unfair means the good name which the preparation of the complainant has acquired by advertising and use among the public at large. Witnesses, who are retail druggists, testified that defendant's agents visited them, and recommended the sale of defendant's article, on the ground that the druggists could palm off defendant's article as complainant's article upon intending purchasers who were not familiar with complainant's package, and who called only for syrup of figs, intending thereby to purchase the complainant's article. The defendant reduces the price of its article very considerably in order to induce druggists to take this course. We are not prepared to say, therefore, that the complainant might not, except for the reason about to be stated, be entitled to some relief, by an injunction against the defendant to prevent unfair competition."

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The court of the Sixth Circuit also based its principles of the Gay-Ola case upon the interesting decision in *Kalem Co. vs. Harper Bros.*, 222 U. S., 55-63, 56 L. Ed., 92, where even motion pictures were held to come within the power of Congress governing copyright, showing that the underlying principles of unfair trade reach out through these various realms.

COCA-COLA v. GAY-OLA.

The case under discussion, *Coca-Cola Co. vs. Gay-Ola Co.* (6th Circuit 912), 200 Fed. 720, 119 C. C. A. 164, is so directly in point that it seems expedient to quote at length therefrom as follows: (The italics in the quotations are ours.)

> "It is first to be observed that defendant is at the best on a narrow ground of legality. The name which it has adopted does not negative an intent to confuse. The product is identical, both in *appearance and taste.*
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> • • • • • • • • • •
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> "Accordingly, we find it recognized by this Court that, in a suit for unfair competition, it is not necessary to show that the immediate purchasers were deceived as to the origin of the goods; but even if they thoroughly understand that they are buying the counterfeit and not the genuine, the manufacturer of the counterfeit will be enjoined from selling it to dealers with the purpose and expectation that it shall be used by the dealers to deceive the consumer. *Garrett v. Garrett* (C. C. A., 6), 78 Fed., 472, 476 (24 C. C. A., 173); *Royal Co. v. Royal*, 122 Fed., 337, 345 (58 C. C. A., 499). And see cases cited in Cyc., vol. 38, p. 778, notes 25 and 26; also *Kalem v. Harper*, 222 U. S., 55, 63 (32 Sup. Ct., 20; 56 L. Ed., 92). Under the principles on which these cases were decided, we are

satisfied that an injunction must go against the defendant. There is no room for it to shift the blame to 'tricky retailers,' as in *Rathbone Co. v. Champion Co.*, 189 Fed. (C. C. A., 6), 26, 33 (110 C. C. A., 596; 37 L. R. A. (N. S.), 258); *defendant is an accomplice, if not the principal in the trick. With this conclusion established, it is obvious that the injunction should forbid all attempts directly or indirectly to encourage or induce the dealer to make the fraudulent substitution;* but complainant also asks that the injunction extend to the use of the barrels or kegs painted of the same color as complainant's, and *to coloring the product itself* with the same color, and to using any packages not plainly marked Gay-Ola."

* * * * * * *

"The question remains whether the injunction should go to the extent of forbidding defendant to sell Gay-Ola *with the identical color it now has;* that is, *to forbid its sale unless colored so as to distinguish it from Coca-Cola.* Defendant contends that such a prohibition is inconsistent with its legal right to make and sell an article which is in fact exactly like Coca-Cola. This contention seems unpersuasive in view of defendant's pleading. In its answer it has abandoned the claims of its advertising literature that Gay-Ola is made exactly according to the Coca-Cola formula, and urges that its product is a different and better compound. It says that it has improved upon the formula of Coca-Cola, while eliminating one of the elements, and that its product is 'greatly superior' to Coca-Cola. It thus destroys a considerable part of the foundation upon which rests its claimed right to adopt a color which will be deceptive; but we pass by this consideration.

"The record justifies the conclusion *that the color is 'non-functional'*—to use the phraseology of the patent law. The bill alleges that Gay-Ola

is 'artificially and unnecessarily' colored so as to look exactly like Coca-Cola. The answer denies this in terms; but it goes on to say that the color is produced by caramel, which is in universal use for coloring purposes, and is used by complainant for coloring Coca-Cola. There is here no claim that caramel serves any other purpose in either compound except *merely to give color,* and say that it is one of the 'component elements' as one of the witnesses does, is saying nothing more. It follows that the adoption not only of caramel but of the selected amount of caramel was for the main and primary purpose of making the two articles look just alike. *In this connection it appears that there is a great variety of coloring materials open to the use of any manufacturer, and selections from which are used by other manufacturers.*

"The record also requires the conclusion that defendant's business had a substantial basis in this contemplated fraud. Doubtless it intended to try to make a reputation and business for Gay-Ola on its own merits in certain quarters, and perhaps eventually in a general way; but it is clear that in the meantime, and wherever it could, and as the easiest way of getting a large business, it intended to have its product sold as and for Coca-Cola. Under these circumstances, we need not consider what the rule would be if the color was the incidental result of an ingredient used for some other purpose, nor yet what the rule would be if the defendant had adopted even a wholly unnecessary identity in color in connection with a good-faith effort to sell its own goods on their own merits. This Court has not yet said that a case of fraudulent competition can be made out solely by proof of identity in a non-functional particular. *Rathbone Co. v. Champion, supra; Hilker Mop Co. v. U. S. Mop Co.*, 191 Fed., 613; 112 C. C. A., 176. This case is not even one of imitating matters of appearance in an article of common manufacture,

like furniture. *Globe Wernicke Co. v. Macey Co.*, 119 Fed., 696, 704; 56 C. C. A., 304. We rest our conclusion here upon the fact that the color was adopted in part as a means of aiding the contemplated fraud, and that, if its adoption was also in part innocent, there is here a confusion caused by defendant; that the burden is therefore upon defendant to see to it that ultimate fraud does not result from this confusion; and that, so far as defendant cannot safeguard this result *it may not use the color.* There is here marked—indeed, close—analogy to the rule of *Westinghouse Co. v. Wagner Co.*, 225 U. S., 604 (32 Sup. Ct., 691; 56 L. Ed., 1222), and to the rule which requires an article which is likely to deceive as to its origin to be distinctly tagged with the name of the real producer. *Merriam v. Saalfield, supra.* It follows without saying that this tag should be in form adapted to reach the notice of the final purchaser."

In *Coca-Cola Co. v. Dubersteim et al.* (D. C., S. D. Ohio W. D., 1918), 249 Fed., 763, the Court held "Coca and Cola" an infringement of the plaintiff's trade-mark, and upon a change by the defendant to "El-Cola" that that was a mere evasion and was an infringement of the trade-mark; and that the subsequent endeavor to evade the infringement by a paper label covering the infringing name was not sufficient because of the liability of the label to become detached.

A similar view of the law relating to similar subject-matter is found in *Moxie Co. v. Doaust* (1st Circuit), 1913, 206 Fed., 434; 124 C. C. A., 316.

The Court by Judge Brown said they could

"see no legitimate reason why Daoust in marketing a beverage so similar to Moxie *in color and taste*, should choose also to adopt a container so

closely resembling that of the Moxie Co., thus *increasing the chance of deception.*"

The Court at page 436 said:

"Counsel for Daoust insists that he is not responsible for the fact that tricky retailers represent the manufacturer as that of the Moxie Co., provided he has done his legal duty in distinguishing his product. If, however, he chooses, without necessity, to imitate in general appearance the complainant's package, *he does not perform his legal duty of distinguishing his product by making differences which leave unimpaired the general resemblance.*

"The question is of similarity in essentials. This similarity could easily have been avoided by ordering a bottle of size or shape different from the Moxie bottle, *or by change in color of the beverage.* See *Coca-Cola Co. v. Gay-Ola Co.* (C. C. A.), 200 Fed., 720, 724, 725. It is suggested that the latter is impossible, but little weight can be given to such suggestion or to Daoust's evidence as to the impossibility of doing so.

"*If the confusion is caused by the general appearance,* the burden is upon Daoust to see to it that ultimate fraud does not result. Though Daoust has a right to use a bottle like the Moxie bottle, and to make a beverage that resembles in taste or in color the complainant's beverage, he has no right to use these things in that special combination in which the complainant uses them, if that has become a distinctive combination distinguishing the complainant's article."

This case, like the quoted and cited Coca-Cola case, clearly supports plaintiff's contentions in the instant case. It is plain and direct in its meaning and says

that the color and taste were features which enabled the deception.

The case of Coca-Cola vs. Gay-Ola is not a passing case to be lightly dismissed. It is a ruling case having been cited with approval by many courts and repeatedly reaffirmed by the same court as for example, 208 Fed., 543; 209 Fed., 920; 211 Fed., 617; 211 Fed., 754; 211 Fed., 942; 215 Fed., 530; 215 Fed., 694; 216 Fed., 265; 222 Fed., 479; 233 Fed., 157; 235 Fed., 414; 240 Fed., 743; 245 Fed., 614; 245 Fed., 830; 247 Fed., 663; 250 Fed., 964, and 264 Fed., 813.

Some of these cases so clearly state the law indicating the objection to the position of the defendant in this case that it seems advisable to refer to a few of them which reaffirmed, or cited with approval, the Gay-Ola case.

For example in *Hiram Walker & Sons v. Grubman, et al.,* 222 Fed., 478, 479, the court said:

> "On the other hand, it is in evidence in these cases that the color of this whiskey is wholly within the control of the distiller and that it is shaded to suit the fancy of the consumer. It is also in evidence that the 'body' and flavor need not be affected by changes in shade. In view of this proof it seems to me that the color may be said to be a 'non-functional' characteristic, as was said of the color of the beverage in *Coca-Cola Co. vs. Gay-Ola,* 200 Fed., 720, 119 C. C. A., 164; Id., 211 Fed., 942, 128 C. C. A., 440, by the Circuit Court of Appeals in the Sixth Circuit."

In the case of *Margaret Steiff, Inc., vs. Bing,* 215 Fed., 204, 207, in a case where the injunction was modified but sustained, the court said:—

> "What makes the fight unfair is always the borrowing by the newcomer from the first maker of something not necessary to excellence of product, but required for functional perfection, yet almost invariably cleverly calculated to attract and fix the attention, or please the eye of the careless."

Kellogg Toasted Corn Flake Co. vs. Quaker Oats Co., 235 Fed., 657, 663, is a case cited to illustrate the law urged by the defendant. The fact is that that carefully and elaborately written case of the 6th circuit was certainly not intended to reverse itself as expressed in the Gay-Ola case, in fact it reaffirms the Gay-Ola case and it says, for example at page 663:—

> "Where a person has so used descriptive words as in truth to establish in them such significance as this with respect to his goods, he is entitled to relief against a subsequent user who is employing the words in a way calculated to effect sales of the latter's goods as those of the former, since such acts constitute unfair and fraudulent competition. *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S., 674, 21 Sup. Ct., 270, 45 L. Ed., 365; *Computing Scale Company v. Standard Computing Scale Co.*, 118 Fed., 967, 55 C. C. A., 459 and citations. The relief granted in such cases is adapted to the circumstances of each particular case, though such as effectively to prevent confusion and fraud in sales of the subsequent user's goods."

Citing numerous cases and quotations from the Computing Scale case of the Supreme Court.

In *Rubber, Etc., Co. vs. Devoe, et al.*, 233 Fed., 150 (N. J., 1916), the court citing the Gay-Ola case with others says (p. 157):

"In applying the rule it is to be borne in mind that the likelihood of deception is not confined to the dealer (who would likely be able to distinguish); but *the rule primarily seeks to protect the ordinary purchaser* or, in other words, the liability of the ultimate consumer to be misled must be reckoned with. *Fuller v. Huff, supra; Samson Cordage Works vs. Puritan Cordage Mills, supra;* 211 Fed., 610, 128 C. C. A., 203 L. R. A., 1915, F., 1107, and cases cited; *Florence Mfg. Co. v. Dowd, supra; Scriven vs. North, supra; Coca-Cola Co. vs. Gay-Ola Co.,* 200 Fed., 720, 119 C. C. A., 164; *International Silver Co. vs. Rogers Corp'n, supra.* Indeed, the rule would be of little practical use **if it could be avoided by showing that dealers would not be deceived; for the dealer would unrestrainedly perpetrate deception upon the ultimate consumer.** So the courts have wisely required that the **manufacturer** must, in the first instance, take such precautions as will make it fairly impossible **for a dealer to deceive an ordinarly cautious customer.**"

In *Kawneer Mfg. Co. vs. Detroit Showcase Co.,* 240 Fed., 757, the court citing a number of cases in which the Gay-Ola case leads, says at page 733:—

"**It is also unfair competition to manufacture a patented or unpatented article and sell it for resale to the ordinary purchaser, if it is so similar in all its details, functional and non-functional, essential and non-essential to the article made by the patentee or original manufacturer that the ordinary man who buys it and uses it cannot tell it from the genuine even though the actual sale to the jobber, the wholesaler or the middleman is without misrepresentation.**"

In *Helment Co. v. Wm. Wrigley, Jr., Co.,* 245 Fed. 824, the court of the 6th circuit had before it a chewing

gum case. The court in that case at page 830, citing numerous authorities, says:

> "True, it is said that the predominating color, pink, is cheaper, but this is simply illustrative of defendant's apparent indifference to the rights of the using public, not to speak of the rights of complainant. It is well settled that *dealers are not so much to be considered as are the ordinary users;* the former will of course know the manufacturer from whom their purchases are made, but the latter are open to deception whether practiced by the manufacturer or the dealer; and hence the effect of producing and dressing goods that are calculated to deceive is at once a temptation to unscrupulous dealers and an imposition upon unwary users."

And again said at page 831, citing other authorities:

> **"It is idle to suppose that defendant's officers cannot discern the injurious effect of the manner in which they suffer the company's brands to be dressed and put upon the market. The defendant is therefore chargeable with knowledge of the inevitable consequences of such conduct and so is open to the inference that it intends its products to be confused with and mistaken for complainant's product."**

In the case of *Shredded Wheat Co. v. Humphrey Cornell Co. et al.*, 250 Fed., 960, the court of the 2nd circuit at page 964 said, citing numerous cases:—

> 'It is in cases where the connotation of origin rises, not from verbal description, but *only from the appearance* of the article, that the trouble arises in application, because the appearance must in some way be changed, or the article must be wrapped or marked. Thus has arisen the prin-

ciple often applied in this court that minor or 'non-functional' changes in appearance may be required, so long as the substantial elements are left in the public domain."

In *Auto Acetylene Light Co. vs. Prest-O-Lite Co.*, 264 Fed., 810, the court of the 6th circuit in extending an injunction in unfair competition said at page 813:—

> "Defendants' contention that customers need not have been deceived, had they taken note of the differences disclosed to their senses in the appearance between the Prest-O-Lite package filled by defendant, is answered by the truism that the imitation need not be such as to mislead the careful and discriminating purchaser; it is enough that it misleads the ordinary and casual buyer. *Coca-Cola Co. vs. Gay-Ola Co.* (C. C. A., 6), 200 Fed., 720, 723, 119 C. C. A., 164."

In *W. A. Gaines and Co. v. Turner-Looker Co.* (Sixth Circuit, 1913) 204 Fed., 553; 123 C. C. A., 79, the unfair competition turned essentially on the plaintiff's word "Hermitage" for whiskey, preceded by "Golden." It was held that the defendant's mark infringed the plaintiff's. The Court said:

> "The defendant must be presumed to have intended the natural consequences of its acts, and having put the goods on the market under a name so nearly like complainant's as to enable dealers to palm them off as complainant's and at a price which makes it an object to do so, an invasion of complainant's rights is shown. *Tarrant & Co. v. Hoff* (C. C. A.), 76 Fed., 959 (22 C. C. A., 644); *Fairbank Co. v. Luckel etc., Co.* (C. C. A., 9), 102 Fed., 327 (42 C. C. A., 376)."

In *Hennessy et al. v. Wine Growers' Ass'n* (D. C., S. D. N. Y., 1914), 212 Fed., 308, the Court (p. 311) in referring to the evidence needed to prove infringement and unfair practice said:

> "It is not necessary to prove a course of business in order to warrant an injunction. I do not think that it is incumbent upon the plaintiff to establish a habit by showing very many sales; it is enough that plaintiff has established several sales from which must be deduced the fact that defendant was willing to make further sales, and that in several of the stores owned by defendant its agents were ready to make sales is clearly established. *Gorham Mfg. Co. v. Schmit* (D. C., 196 Fed., 955; *Julius Kessler & Co. v. Goldstrom*, 177 Fed., 392 (101 C. C. A., 476); *A. B. Dick Co. v. Henry* (C. C.), 149 Fed., 424; *Badische Anilin, etc., v. Klipstein* (C. C.), 125 Fed., 543, 556; *Samuel & Co. v. Hostetter*, 118 Fed., 257 (55 C. C. A., 111); *Chicago P. T. Co. v. Phila. P. T. Co.* (C. C.), 118 Fed., 852; *Hostetter Co. v. Conron* (C. C.), 111 Fed., 737; *Hostetter Co. v. Schneider* (C. C.), 107 Fed., 705; *Hostetter Co. v. Sommers* (C. C.), 84 Fed., 333; *Hostetter Co. v. Becker* (C. C.), 73 Fed., 297; *Hostetter Co. v. Brueggeman* (C. C.), 46 Fed., 188."

On this point in *Yale and Towne Mfg. Co. v. Worcester Mfg. Co.* (D. C., D. Mass., 1913, 205 Fed., 952), the Court said at p. 957:

> "It is claimed by the plaintiff and denied by the defendant that this evidence proves that the public are being misled by the defendant's use of the name. It seems to me unnecessary to discuss this question apart from the exhibits themselves. Proof of actual deception is not necessary. The Court may determine without it, from the exhibits them-

selves, whether deception will be the natural and probable result of their use. *Notaseme, etc., Co. v. Straus* (C. C. A.), 201 Fed., 99, 100. I am unable to doubt that some deception would be their natural and probable result in this case, or that their use has had that result."

In *Notaseme Hosiery Co. v. Straus, et al.* (Second Circuit, 1912), 201 Fed., 99; 119 C. C. A., 134 (decision on profits, 215 Fed., 361; 131 C. C. A., 503), the Court holding that the evidence was insufficient to show actual deception, said:

"Such proof, however, is not necessary. The question is whether the natural and probable result of the use by the defendants of its label will be the deception of the ordinary purchaser, making his purchases under ordinary conditions—where there is a degree of similarity calculated to deceive."

In *Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.* (Eighth Circuit, 1913), 206 Fed., 611; 124 C. C. A., 409 (affirmed, 240 U. S. 251), the Court having before it a case in which the defendant was enjoined from applying "American Lady" on shoes when his name appeared only on the carton, said (p. 616):

"In cases of unfair competition, the fraudulent intent is often inferred from the facts, sometimes against the sworn protestations of the infringer. *Fairbanks Co. v. Windsor, et al* (C. C. A.), 124 Fed., 200 (61 C. C. A., 233); *Florence Mfg. Co. v. Dowd, et al.* (C. C. A.), 189 Fed., 44 (110 C. C. A., 608). And so this Court held on the former appeal (165 Fed., loc. Cit., 416; 91 C. C. A., 363)."

Again at page 617:

> "If a manufacturer or wholesale dealer wilfully puts up goods in such a way that the ultimate purchaser will be deceived into buying the goods of another, it is no defense that he does not deceive and has no intention of deceiving the retailer, to whom he himself sells the goods. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser. *Scheuer v. Muller et al.* (C. C. A., 744 Fed., 225; 20 C. C. A., 161); *Dennison Mfg. Co. vs. Thomas Mfg. Co.* (C. C.), 94 Fed., 651; *National Biscuit Co. v. Baker et al.* (C. C.), 95 Fed., 135; *Fairbank Co. v. Bell Mfg. Co.*, 77 Fed., 869 (23 C. C. A., 554); *Revere Rubber Co. v. Consolidated Hoof Pad Co.* (C. C.), 139 Fed., 151; *Lever v. Goodwin*, L. R. Ch. Div., 1; *Gulden v. Chance et al.* (C. C. A.), 182 Fed., 303 (105 C. C. A., 16).
>
> "In such cases the complainant will not be held to specific proof that ultimate purchasers were deceived, and limited to loss or profits thus established. Loss will be presumed."

In *Lawrence et al. v. P. S. Sharpless Co.*, 203 Fed. 762, affirmed in 208 Fed. 886; 126 C. C. A., 46, there is in the decision of the lower court an excellent statement of the law. The statement need not be quoted in full, but includes this reference to the importance of color, as follows:

> "A comparison of the label of the complainants, printed in blue upon tin foil, with that of the defendant, also printed in blue upon tin foil, discloses such identity in form, color and design as to indicate an intentional imitation."

In *Samson Cordage Works v. Puritan Cordage Mills* (C. C. A., 6), 211 Fed., 603, the Court said:

> "However, the protection against unfair competition is not limited to such imitation or conduct as would deceive a cautious and discriminating purchaser, but includes such as would be likely to mislead the ordinary or usual buyer; and the liability of the ultimate consumer to be misled must be reckoned with. *Edward Hilker Mop Co. v. U. S. Mop Co., supra; Coca-Cola Co. v. Gay-Ola Co.* (C. C. A., 6th Cir.), 200 Fed., 720, 723, 119 C. C. A., 164; *Gaines v. Turner-Looker Co., supra,* 204 Fed., at page 556, 123 C. C. A., 79. And if the marking of defendant's cord was such that it was likely, by the ordinary purchaser, to be taken for complainant's cord, if not closely examined, the failure to use distinguishing labels would normally be evidence of an intent to mislead. In such a case a burden would rest upon defendant to see to it that purchasers are not likely to be deceived by confusion between the two marks; and, if defendant's product cannot be so dressed or put out as substantially to assure such result, defendant should not be allowed to use the mark in question. *Coca-Cola Co. v. Gay-Ola Co., supra,* 200 Fed., at pages 274, 275, 119 C. C. A., 164."

In all cases of unfair competition, the principals may turn as a refuge to charging the retailer or the agent with having done what anyone in such a position would be likely to do. The principal hands him a product, not as his own product, distinguished, as it might well have been, in color or taste or in dressing, from that of the plaintiff, but as a counterfeit of plaintiff's product, and seeking whatever reputation he might obtain from what has been done by the plaintiff.

Defendant in the instant case has been left without support for its belated pretensions that the color and taste given its product were the necessary pharmaceutical consequences of completing it. It is proved beyond question that defendant, with many materials for manifold colors and tastes readily obtainable, chose a particular color and taste, not because it was the best, or in any degree essential, from pharmaceutical considerations, but because it was precisely the color and taste which was essential for the purpose of substitution and deception and to enable its product to be "passed off" for plaintiffs.

In the oft-cited case of *Fox vs. East Baking Co.*, 209 Mass., 251 (1911), Loring, J., said, in speaking of the use of an oval loaf in the manufacture of bread—

> "And the defendant would have a right to make and sell bread which has that shape, were it not for the fact that bread of that shape means to the public that it is made by the plaintiff."

In citing the authorities, plaintiff has selected those which are believed to apply directly to the instant case. The decrees in unfair competition cases vary widely with the circumstances, but all agree in reaching the thing which is the basis of the scheme of unfair trading. They all agree in declining to accept flimsy excuses when the evidence shows the clear intent was to take away the plaintiff's trade and to do this by the adoption of some one, or many things, which go to the heart of the matter. In speaking of the trend of these cases, Nims on "Unfair Competition and Trade-Marks" (second edition), p. 238, says:

> "Seldom does the newcomer in any commercial field have *absolute* rights as to the use of these

common characteristics of the article he sells. He must first consider, not himself, but those who entered the field before he did, with whom the public have become acquainted. If he can not enter the business without confusing himself with one or more of these older concerns he will be compelled to stay out."

THE GENERAL PRINCIPLES OF UNFAIR COMPETITION.

All these various principles rest on familiar statements of the law. One much quoted and applied is *Putnam Nail Co. v. Bennett, et al.* (C. C., E. D. Pa., 1890), 43 Fed., 800, where Mr. Justice Bradley had before him a case in which the counsel for the defendant in the present case appeared for the complainant. The complainant had bronzed his product, horseshoe nails, as a trade-mark to indicate the origin of the nails.

The Court declined to dismiss the bill on demurrer and announced the rule of law applying to this class of cases as follows:

"Whether this is in itself a good trade-mark or not, it is a style of goods adopted by the complainants which the defendants have imitated for the purpose of deceiving, and have deceived the public thereby, and induced them to buy their goods as the goods of the complainants. This is fraud. We think the case should not be decided on this demurrer, but that the demurrer should be overruled, and the defendants have the usual time to answer. The allegation that the complainants' peculiar style of goods is a trade-mark may be regarded as a matter of inducement to the charge of fraud. The latter is the substantial charge, which we think the defendants should be required to answer."

This direct and even blunt statement of the law has been repeatedly cited and quoted, as for example in *Cleveland Stone Co. v. Wallace, et al.* (*C. Cys., E. D.* Mich., 1892), 52 Fed., 431, 438; *Heller and Merz Co. v. Shaver, et al.* (C. C., N. D. Iowa, 1900), 102 Fed. 882 (quoted at 887); *Scriven, et al. v. North, et al.* (Fourth Circuit, 1904), 134 Fed., 366 (67 C. C. A., 348); *Kronthal Waters, Ltd. v. Becker* (C. C., E. D. Pa., 1905), 137 Fed., 649 (cited 653); *Standard Varnish Works v. Fisher, Thorsen & Co.* (C. C., Oregon, 1907), 153 Fed., 928 (quoted at 931); *Shredded Wheat Co. v. Humphrey Cornell Co., et al.* (D. C., D. Conn., 1917), 244 Fed., 508, 522; and cited and quoted with approval by the U. S. Supreme Court in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S., 537 (34 L. Ed., 997, 1004).

Of these cases it may be noted that Judge Thomas in *Shredded Wheat Co.* cites and quotes elaborately from the authorities bearing out the various points customary in unfair competition cases, saying, for example, at p. 522 (244 Fed.):

> "The vital question here—as in all cases of like kind—is not whether dealers are liable to be deceived in buying from the manufacturer or wholesaler, but whether the user is liable to be misled in buying from the retailer. This distinction is well borne out and sustained by the Circuit Court of Appeals for this circuit in *Enterprise Mfg. Co. v. Landers; Frary & Clark, supra; Yale & Towne Mfg. Co. v. Alder*, 154 Fed., 37 (83 C. C. A., 149); *Rushmore v. Manhattan Screw & Stamping Works*, 163 Fed., 939 (90 C. C. A., 299 L. R. A. (N. S.), 269); *Rushmore v. Badger Brass Mfg. Co.*, 198 Fed., 379 (117 C. C. A., 225); *Rushmore v. Saxon*, 170 Fed., 1021 (95 C. C. A., 671), and by Mr. Justice Bradley in *Putnam Nail Co. v. Ben-*

nett (C. C.), 43 Fed., 800, in an opinion which is quoted from with favor by the Supreme Court in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S., 537, 549 (11 Sup. Ct., 396; 34 L. Ed., 997). Another well-considered and instructive case sustaining this view is *Banzhaf v. Chase*, 150 Cal., 180 (88 Pac., 704)."

DEFENDANT'S POSITION.

So long ago as the "Statute against Monopolies" the word "Monopoly" was used in the brief sense as a means of restraining individuals and corporations "of any freedom or liberty that they had before or hindered in their lawful trade."

Defendant's counsel rely upon the English case, *Lever Bros. Ltd. vs. Massbro' Equitable*, etc., Soc. 29 Rep. Pat. Cas. 225, 234, 106 L. T. 472, where the plaintiff owned "Brooks' Monkey Soap," the defendant "Lux."

The defendant's counsel endeavors to make it appear that the plaintiff in the instant case is, like the plaintiff in this cited case, trying to prevent another dealer from selling a plainly marked substitute "Lux" to the customer buying the goods instead of the "Monkey Brand," which the dealer could not supply. That is to say, in the soap case, there were two brands of soap each marked plainly and clearly with entirely different names. When "Monkey Brand" was asked for the salesman sometimes offered "Lux." It was impossible to make a mistake because the purchaser was there and he could take or not take the substitute offered. He could see for himself what the offered substitute was. It was not a case like this instant case because the salesman in the soap case did not put a product resembling in every particular the plaintiff's product in a bottle

bearing the name of the plaintiff's brand to send to a customer who had asked for the plaintiff's goods and who had no way of telling he was not getting the thing he expected.

As to "substitution" counsel for defendant said in his brief below, this most extraordinary thing.

"Now, a physician buys whatever drug he pleases and prescribes it. His patient takes what is given him. How can there be any unfair selling method in this?"

Of course, *a physician if he buys Quin-Coco from defendant knows that he is getting just that and not Coco-Quinine,* but how does he know what the druggist gives his patient in filling his prescription.

This argument would seem almost incredible if the words were not there. It must be apparent that even the "dispensing physician" can be deceived as well as the patient when he buys from a druggist Quin-Coco in the belief and trust that he is getting "Coco-Quinine," particularly when it comes to him from the druggist bearing the label "Coco-Quinine."

The quotation from the Lever Bros. case shows the kind of substitution meant by the defendant, that is, handing out to a customer one kind of clearly marked goods instead of another, or offering to sell for example "Lux" soap when "Monkey brand" was asked for. Even in such cases the courts expect some explanation to the consumer. That is, the salesman universally says something to the effect "We have not the brand you asked for, but here is another brand which is about the same," or "just as good." That practice might do with soap because the user of soap is probably as much of an expert as the salesman and he does not regard it as a serious matter in any event; but when a physician orders a particular drug or a customer asks for a particular drug it needs no argument

to justify the assertion that it is unfair, a deception and fraud to give him another drug that looks like the one he asks for, and to indicate that it is the drug he asked for.

The defendant also relies upon the old case "Hostetter vs. Fries, 17 Fed. 620 (N. Y.) but omits to emphasize the qualification of Judge Wallace who said "provided care is observed to fill the preparation as a manufacture of the seller and not a preparation made by another."

In *Hiram Walker & Sons vs. Grubin*, 224 Fed. 175 (N. Y.), the court held that the defendants had a right to make a *particular kind of whiskey, but that they should so distinguish their product that people should not be deceived and buy it as genuine Canadian whiskey.* This was the whole point of that case.

Again, in *Rice v. Redlich Mfg. Co.*, 202 Fed. 155 (from the Third Circuit), the opinion states the general doctrine that an unpatented article may be copied and sold but says:

> "Every one may have the right to make such article but no one has the right, in putting the same article on the market to use any package, common law trade-mark, label *or other dress or indicia* calculated to induce the casual purchaser to believe that the article is the manufacture of another person. **This general statement of what may constitute unfair competition, while not exhaustive, may include such imitation of form or color or other essential and external details of the article itself as may deceive the casual purchaser as to the origin of the manufacture.**"

By "copying" in this line of decisions the Courts invariably refer to the thing in its essentials for use, and never to include non-essentials used merely for

identifying purposes. This is wherein, if pertinent at all, they support plaintiff's rather than defendant's case.

In the case of *W. A. Gaines & Co. vs. Turner-Looker Co.* (6th Cir. 1913), 204 Fed. 553, 123 C. C. A. 79, the Court said:

> "The defendant must be presumed to have intended the natural consequence of its acts, and having put the goods on the market under a name so nearly like complainant's so as to enable dealers to palm them off as complainant's and at a price which makes it an object to do so, an invasion of complainant's rights is shown."

Likewise the District Court in Massachusetts (1913) in *Yale and Towne Mfg. Co. vs. Worcester Mfg. Co.*, 205 Fed. 952, said:

> "It is claimed by the plaintiff and denied by the defendant that this evidence proves that the public are being misled by the defendant's use of the name. It seems to me unnecessary to discuss this question apart from the exhibits themselves. The proof of actual deception is not necessary. The Court may determine without if from the exhibits themselves whether deception will be the natural and probable result of that use."

And again, for example, the Court of Appeals in the 8th Circuit (1913) in *Wolf Bros. & Co. vs. Hamilton-Brown Shoe Co.*, 206 Fed. 611, 124, C. C. A. 409:

> "In cases of unfair competition the fraudulent intent is often inferred from the facts, sometimes against the sworn protestations of the infringer."

And at page 617 the Court said:

> "If a manufacturer or wholesale dealer wilfully puts up goods in such a way that the ultimate purchaser will be deceived into buying the goods of

another, it is no defense that he does not deceive and has no intention of deceiving the retailer, to whom he himself sells the goods. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser (here citing numerous cases)."

"In such cases the complainant will not be held to specifically prove that ultimate purchasers were deceived, and limited to loss or profits thus established. Loss will be presumed."

Notwithstanding these strong statements of the Courts recognizing the difficulties in such a case, the plaintiff, here did proceed to establish the custom and habit of the defendant as has been shown heretofore.

TRADE-MARK—COCO-QUININE.

Respondent (plaintiff) contends that the name "Coco-Quinine" has by long and exclusive use come to designate in the drug trade only one thing, viz.: the medicine made and marketed by plaintiff under that name. This is shown by the fact that none of the manufacturers who undertook from time to time to market imitation preparations ever used the name "Coco-Quinine." The various products of this class introduced as exhibits by defendant during the taking of testimony (petitioner's brief, p. 27) all bore names sufficiently different from plaintiff's name to show that these concerns recognized plaintiff's right to the name even though they sought to invade plaintiff's market with an intended substitute made to imitate the physical appearance and characteristics of plaintiff's preparation. In this the instant case is not unlike the case of *Coca-Cola Co. vs. Koke Company of America,* 254 U. S. 143, wherein this Court held that the name "Coca-Cola" had acquired a secondary meaning and that the

Coca-Cola Company is entitled to the exclusive use of said name as a trade-mark.

In that case this Court said:

> "Whatever may have been its original weakness, the mark for years has acquired a secondary significance and has indicated the plaintiff's product alone. It is found that defendant's mixture is made and sold in imitation of the plaintiff's and that the word Koke was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff and of selling the imitation as and for the plaintiff's goods. * * *
>
> "The argument does not satisfy us. We are dealing here with a popular drink not with a medicine, and although what has been said might suggest that its attraction lay in producing the expectation of a toxic effect the facts point to a different conclusion. Since 1900 the sales have increased at a very great rate corresponding to a like increase in advertising. The name now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words Coca-Cola probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances. Although the fact did not appear in *United States v. Coca-Cola Co.*, 241 U. S., 265, 289, we see no reason to doubt that, as we have said, it has acquired a secondary meaning in which perhaps the product is more emphasized than the producer but to which the producer is entitled."

In *Holeproof Hosiery Co. v. Wallach Bros.* (C. C. A. 2d) 172 Fed. 859, 860, Judge Lacombe, considering the word "Holeproof" as a trade-mark said:

> "Nor do we find any particular force in the objection that the word is descriptive. The record, as it now stands, sufficiently indicates that by expensive advertising and large sales during several years the word 'Holeproof' has acquired a secondary meaning, indicating to the prospective purchaser, not that socks sold under it are indestructible, but that they are those which complainant has been making and supplying to consumers, apparently to their entire satisfaction."

In *Wunder Mfg. Co. v. Block* (C. C. A. 9th) 249 Fed., 748, 749, the court held the word "Arch Builder" and "Heel Leveler" to be good trade-marks for in-soles for shoes, saying:

> "And the terms 'Arch Builder' and 'Heel Leveler,' as used by the plaintiffs, are susceptible of exclusive appropriation, since they are used in a secondary sense. The primary meaning of 'arch builder' is one who builds arches. No suggestion is conveyed that the arch referred to is the arch of the foot. The primary meaning of 'heel leveler' is perhaps more obscure, but it is more suggestive of the shoemaker's trade than that of the chiropodist. It is only in its application to the plaintiffs' device that its significance becomes apparent."

The proofs clearly establish that plaintiff began using the name "Coco-Quinine" in the latter part of 1899 or early part of 1900, to designate the new medicine which was at that time produced in its laboratories and made valuable for use. No other concern has ever used the name for any purpose, even to the present day, so far as known. Approximately 25 years of continuous, extensive, and exclusive use would seem to establish plaintiff's claim to trade-mark rights in the

name under the authority of the decisions above quoted from.

It can not be denied that defendant's name "Quin-Coco" under which it sells its product to the retail drug trade is a close simulation of plaintiff's name "Coco-Quinine" and that its use if employed in actual competitive business, would inevitably result in confusion.

How easy it is to confuse the words comprising the names of the products in referring to them is shown not only by mistakes of counsel made and acknowledged in the record, of which mention has before been made, but it is noted on page 30 of petitioner's brief, fourth line from the top, counsel for petitioner have inadvertently used the name "Coco-Quin" when evidently it was intended to use the name of one of the products.

Errors in Petitioner's Brief.

No attempt has been made to reply point by point to the arguments submitted in petitioner's brief, but rather to present respondent's case on its merits, and thus present a complete reply as seen from the viewpoint of respondent.

However, it may not now be out of place to briefly respond to some of the points urged in behalf of petitioner.

It is urged for petitioner (p. 25 of petitioner's brief) that chocolate was used for years to disguise quinine before respondent made its preparation. It is sufficient answer to this to say that chocolate was never used to disguise the bitter taste of quinine sulphate because that thing cannot be done with chocolate, and since it can not be done, no one ever did it.

Chocolate coated pills and tablets containing medi-

caments of many different characters have been made. If the pill or tablet is swallowed before the coating is dissolved, of course, the person taking the medicine will not taste the bitterness. The same thing is true when like medicines are taken in capsules, or in pill or tablet form coated with any other substance.

There is absolutely not a syllable of evidence to show that anyone ever made a successful liquid quinine medicine of permanent form, containing quinine sulphate as the medicinal agent, in which the bitterness of the quinine was disguised with chocolate, or anything else, prior to the time plaintiff put its medicine Coco-Quinine on the market. There is not a syllable of evidence showing that anyone ever at any time disguised the bitter taste of quinine sulphate with chocolate. Yerba Santa is the disguising agent, and the only disguising agent as has been abundantly proved and acknowledged. Prior to the discovery of this quality in Yerba Santa, licorice had been used but with only partial success.

The use of chocolate in plaintiff's product is for absolutely no purpose but to give to it a distinctive color and flavor, to identify its origin; and the use of chocolate in defendant's product is for absolutely no purpose except to make it like plaintiff's and so that it can be sold as and for plaintiff's.

Plaintiff Sought No Monopoly.

It did not patent its formula. The manufacture and sale of *the medicine*, as such, is free to everyone. It is abundantly shown by the evidence that the identical medicine can be manufactured of a large variety of different colors and different flavors and a medicine identical with Coco-Quinine, in so far as every therapeutic

condition and value are concerned, given to the public without the use of chocolate to color and flavor it.

The Philadelphia laboratory of Searle & Hereth is referred to in the Brief for Petitioner (p. 31). The Philadelphia laboratory of Searle & Hereth and the St. Louis laboratory of Searle & Hereth are shown in the proofs to be one and the same as the Philadelphia laboratory of Wm. R. Warner & Company and the St. Louis laboratory of the Pfeiffer Chemical Company. The laboratories are identical. The employees are identical, and the only justification for referring to the Searle & Hereth laboratory anywhere is the fact that on some preparations defendants use a Searle & Hereth label for trade reasons. (G. A. Pfeiffer, p. 1227, X-Qs. 223-227.)

With knowledge of his physician. In the Brief for Petitioner (p. 52) it is urged that Mr. Heno was evidently using Quin-Coco with the knowledge of his physician. There is nothing in the evidence to justify this assertion but, rather, that the physician on investigation discovered that he was being imposed upon; that the investigation came about because of unsatisfactory results from the prescriptions filled at Heno's pharmacy, calling for Coco-Quinine; and that when the physician found out that Heno was dispensing defendant's product Quin-Coco instead of plaintiff's product Coco-Quinine, which his prescription called for, he called Heno to account and ordered him not to do this but to obtain plaintiff's Coco-Quinine and fill his prescriptions correctly.

Discharged employees. In the Petitioner's Brief (p. 66) reference is made to "several discharged employees of petitioner." This is an unfair statement

because the record does not show, with the possible exception of Thurman and Greene, that they were discharged. It may as well be asserted that the others left to accept better positions with other houses. It is shown that Thurman was discharged because while at lunch with Mr. Merner in a conversation he referred in a complimentary way to the goods of a competing house. Here we obtain a clear understanding of the significance of the statement in defendant's "salesman's creed that "it does not pay to even mention your competitor." (P. 40, Petitioner's Brief.)

Bias of employee witnesses. In Petitioner's Brief (p. 83) counsel reflect upon the testimony of plaintiff's witness Hooper on the ground that he "testified with natural bias in favor of his present employer." Tested by this rule, there is but little testimony in the record for defendant that is entitled to any greater weight or consideration.

Market for Quin-Coco. In Petitioner's Brief (p. 86) the point is made that there was a market for Quin-Coco. There is abundant evidence in the case showing that the market that existed had been created by plaintiff's efforts and at plaintiff's expense and that the market for this particular medicine was under the name Coco-Quinine or chocolate quinine (the latter name being frequently confused by some classes in certain localities with the name "Coco-Quinine") because of this work and these expenditures by plaintiff.

Improper rebuttal. Counsel for petitioner complain that some of the testimony taken in rebuttal for plaintiff was improperly offered and urged that it should have been excluded. In reply it may be said that sub-

stantially all of the so-called improper rebuttal testimony was of additional witnesses called to prove the acts of defendant's salesmen respecting their methods in selling Quin-Coco. These salesmen had been called to deny what had been said by witnesses testifying for plaintiff while taking its testimony-in-chief and this additional or cumulative proof was put in to rebut these denials by defendant's salesmen. The same defendant's salesmen were re-called and denied the statements by these additional witnesses just as glibly and positively as they had similar statements by plaintiff's other witnesses. We have the situation of one defendant's salesman saying positively that three to six or eight responsible disinterested witnesses for plaintiff were testifying falsely as to what he said in his efforts to make sales of Quin-Coco to them.

Right to duplicate plaintiff's product. Petitioner's Brief (p. 106) makes the point that the Circuit Court of Appeals is in error in depriving petitioner "of the exercise of its admitted right to duplicate respondent's product by a preparation of its own." It has been said repeatedly on behalf of respondent, and is said again, if petitioner wishes to duplicate respondent's product limiting its duplication to the medicinal characteristics, the medicinal formula, omitting the non-essential color and flavor imparted to it by the use of chocolate, no objection will be raised by respondent.

COURT OF APPEALS DECISION HAS BEEN APPROVINGLY CITED BY OTHER COURTS.

It should be noted that the decision of the Circuit

Court of Appeals has been cited and followed by other courts as follows:

In the Second Circuit by Judge A. N. Hand in *Cheney Bros.* vs. *Gimbel Bros.*, 280 Fed. 746.

In the Sixth Circuit by Judge Westenhaver in *Knight* vs. *Milner Co.*, 288 Fed. 816.

CONCLUSION.

In this case, as in practically all cases of unfair competition in business, the defendant found a market created by the efforts and at the expense of plaintiff. The very testimony of the defendant's, as well as that of plaintiff's expert witnesses, shows that a variety of fair and legitimate means and methods of competition were open to defendant. Defendant did not copy the exact name of the plaintiff's product but took a simulated name upon which to string excuses, simply reversing the words of plaintiff's trade-mark. In short, it would have been impossible to have more closely followed plaintiff's mark without actually copying it. It was just enough different to enable experts and dealers to differentiate by title from Coco-Quinine, and yet sufficiently similar to suggest the very acts which were material to the introduction of "Quin-Coco."

The allegations of plaintiff's bill have been fully proved.

Defendants are shown to be unfair traders beyond question and without excuse.

The road to fair and honorable competition was wide open, the way plain and easy.

One concern (the Pitman-Moore Co.), at least, manufactured and sold a strictly competing preparation without either the color or the flavor of Coco-Quinine.

The evidence is conclusive that an identical prepara-

tion, in so far as its medicinal virtue is concerned, might have been made and sold by defendant, having any one of many different colors and any one of many different flavors, and honest and legitimate competition thus established.

Defendants are shown to have gone to great pains, with premeditation and deliberate purpose, to duplicate the exact color and the exact flavor of plaintiff's product; to have exploited their preparation to the retail drug trade as the same thing as Lilly's Coco-Quinine and a product that could be sold for Lilly's Coco-Quinine and when Lilly's Coco-Quinine was called for, without detection; and it is shown that this work and these methods were followed by the expected results.

The bare outlines of the case show unfair trading. There can be no doubt in view of the overwhelming evidence, that those responsible for the trade policy of defendant, carefully and deliberately planned the simulation and counterfeiting.

Ordinary knowledge of human nature and of "business" makes it obvious beyond cavil that the results were results which were expected and intended by the officers of the defendant company.

The same purpose involved in the choice of the name was present in the "dressing" of the goods. The evidence shows convincingly that practically illimitable opportunities to produce a legitimately competitive article, distinct in appearance and taste, were open to the defendant. Nevertheless no one can read this record without conviction that the persons acting for defendant had before them the successful formula of the plaintiff and then addressed themselves to the task of producing an article which could not be distinguished

by appearance (color) or taste from that of the plaintiff; and to devising a name which even the veriest tyro must have known would inevitably contribute to the results which followed.

That is, the defendant's officers, with industry and cunning purpose, put into the field long before occupied by the plaintiff a product which could start immediately as a substitute for plaintiff's, with every effort and expense of making a market and reputation for such product performed and met by plaintiff; and which would, because it duplicated the physical appearance, the indicative character, of the "trade dress," of plaintiff's, coupled with the lower price, present the desired opportunities for all the shades of unfair trading which inevitably followed, as illustrated in the record.

The evidence is clear that defendant's salesmen were instructed and expected to do exactly as they did do, induce the retail druggist to buy defendant's Quin-Coco and dispense it when plaintiff's Coco-Quinine was called for by prescriptions or customers. Whether much or little instruction was given to these shrewd agents who went out from the defendant into the field, the patent facts were known and the particular instructions would make but little difference. Coco-Quinine had been introduced and "detailed" by plaintiff to the medical profession and the trade. Plaintiff's product was the first of its kind, the first of its name. Its place in professional and public estimation had been made by no ordinary efforts of promotion. They were both laborious and expensive. The indicative character of its trade dress had been for a long time thoroughly established and recognized. Graduates of medicine and pharmacy, practical experts in these lines, had care-

fully explained the qualities and uses of the new remedy to thousands of physicians in many States.

The introduction of the new product, "Coco-Quinine," by plaintiff was, then, the result of careful preparation, patient education and great expense. The product had been given a distinct color and distinct taste so that it might be known by all users and dealers, might, in fact, bear *in itself* the label of Eli Lilly & Co.

Defendant's agents came to the druggist bearing credentials in the name of an old established firm, of high reputation.

Defendant's officers and employees have endeavored to make it appear that their agents were not *instructed* to do the admittedly dishonest things which the testimony overwhelmingly shows they did. It would be expected that people inducting such a self-starting scheme would deny giving instructions how to promote it. The manifold cases on unfair trading abound in just such instances of either false swearing or of threadbare arguments devised, sometimes as excuses, and sometimes as the natural effort of human nature to palliate an offense.

It will be noted that the defendant's officers carefully elaborate what they claim they did *not* tell their repre-representatives, but there is not the slightest indication in the record that they ever made any endeavor to stop their admittedly dishonest practices; that they for a moment considered the injury to the plaintiff and the public, or by a single act from beginning to end evidenced the slightest desire to distinguish their product from plaintiff's. We have seen that the defendant's officials even laughed over the fact that druggists had asked for plaintiff's fresh labels to replace ones on their bulk supply bottles that had become so

dirty from long use in dispensing Quin-Coco therefrom as to be illegible, indicating that they consider this kind of fraud—this "knocking out the eye of Eli Lilly & Co." as one of their men expressed it, a good joke. Every act by defendant from the beginning was to counterfeit plaintiff's product and promote fraudulent substitution, "passing off" and confusion in the trade.

Defendant's officers and employees, long after the event, gathered the information, which they say is their excuse for using chocolate to impart the desired appearance and taste, but which is shown by plaintiff's experts and by plain common sense to be without the slightest merit. There is not the slightest evidence that any investigation was made to discover anything else that might have been used in its place, when they devised their product and scheme. There is not the slightest evidence that they ever studied the literature of the art to determine what they could use to distinguish their goods from that of plaintiff.

The record shows that there are materials in abundance which could have been used for the same purpose for which the chocolate was used by plaintiff; but there is not the slightest evidence that defendant in the beginning, or at any time, made any effort to ascertain the fact. The fact came out not only in plaintiff's testimony, but also in that of defendant, but defendant's witnesses produced the information only on cross-examination. By the testimony it appears that the knowledge was at hand, ready for defendant if defendant really had desired that knowledge.

The evidence is convincing that all defendant desired for producing the preparation was the formula of the plaintiff and a sample of plaintiff's product, possibly

some instruction from a chemist who had been in plaintiff's employ so that, as the superintendent of the defendant's laboratories says, they could get the same "*physical appearance.*"

There is a sharp distinction between the whole of plaintiff's testimony and the whole of defendant's. Plaintiff has called impartial men by the score from widely separated regions, men who have no interest in the suit and no interest in plaintiff. Some of these men under oath have admitted unfair practices, practices which were dishonest. Witnesses have testified in great numbers to the temptation put before them by defendant's representatives and put before them in a way which, as might be expected, was denied by the men who devised and urged these schemes, when their employment depended upon it.

Plaintiff's witnesses tell an obvious story, following precisely what must have been expected and intended by defendant's leaders when they produced the counterfeit product. Men do not invent schemes of this sort and then expect their representatives to be squeamish about their methods of "*getting orders.*"

The denials of defendant's officers and employees are hardly believable, but if these perpetrators of "Quin-Coco," who not merely followed the formula but who copied the color and taste of the plaintiff's Coco-Quinine, had given instructions to their representatives to *not* call attention to this striking resemblance; to *not* mention the fact of similarity, to *not* urge that defendant's product could be substituted for plaintiff's; to *not* show the apparent identity; to *not* urge that orders for plaintiff's product be filled with defendant's; to *not* show the gain which would arise from these practices—the results must have been the same, for the

agents would *by indirection* have received the same information and instructions as if they had been told to do just what they did.

It would be as if they should put bombs in the hands of anarchists and tell them that they must *not* throw these bombs at public officials or public buildings.

Plaintiff called a number of witnesses who had indignantly rejected defendant's product and scheme of deception; and others who were so impressed by the arguments of defendant's representatives that they agreed to these unfair methods, realizing later the mistake they had made.

Defendant's officers and employees did not have the hardihood to deny that the practices set forth in the plaintiff's records at great length are unfair and dishonest. They contend that what they did in preparing an article in the closest possible simulation of plaintiff's article was correct; they maintain that their selection of a name which was a mere reversal of plaintiff's name was correct; but they admit that the very practices which necessarily flow from sending their men out with an article identical with plaintiff's, in the characteristics of color and taste, and under the simulated name, were unfair and dishonest.

It is submitted that a more flagrant and inexcusable case of unfair trade than the one here made out would be difficult to conceive, or one more burdened with fraud and deceit, or more likely to cause serious injury to the public as well as to the plaintiff.

In view of the abundant proofs found in the record supporting all the charges of plaintiff's bill; in view of the failure by defendant by its proofs to substantiate any of the material allegations of its answer; and in view of the rules of law controlling the facts proved, as established by the many court decisions cited, it is

submitted that the property rights and trade rights of plaintiff have been unfairly and illegally invaded to the great wrong and damage of plaintiff; that the public has been defrauded and imposed upon; and that to the end that plaintiff's just rights may be secured and respected, the rights and interests of the public protected, and justice meted out, the decision of the Circuit Court of Appeals in directing a decree prohibiting the use of chocolate by defendant in its preparation is right, and in this conclusion it should be affirmed.

It is further submitted, however, that said Court erred in holding that the name "Coco-Quinine" is "but descriptive of the ingredients in the compound and, therefore, can not become the subject of trade-mark." It is urged that the long and exclusive use of said name by plaintiff, "whatever may have been its original weakness," has given to said name a secondary meaning; that, as in the *Coca-Cola Co.* vs. *Koke Co.* case, it has from the beginning indicated plaintiff's product alone; that it means this single thing coming from a single source and, therefore, that plaintiff (respondent) has trade-mark rights in said name. It is submitted, further, that defendant's name "Quin-Coco" is but a simulation of plaintiff's name "Coco-Quinine," a mere reversal of words, and, therefore, that its use by defendant should be enjoined.

Respectfully submitted,

E. W. BRADFORD,
Counsel for Plaintiff.

Washington, D. C.,
April 4, 1924.

Quinine Syrup.

A series of experiments were made using as a base Yerbazin (uncolored); Yerbazin 38 syr. 1; and Yerbazin 1 and syrup 1 with quinine alkaloid, quinine sulphate and quinine tannate respectively. It was found that the alkaloid was the most and the tannate the least bitter. Also diluting the yerbazin tended to develop the bitterness. To give a distinctive color both Budbear and Carmine were used.

Coco-Quinine

It occurred to the writer that a syrup containing chocolate would give both a distinctive color and an elegant flavor.

(Photolithographic copy of Plaintiff's Exhibit "Document No. 1," page 147 of Mr. Eberhardt's journal.)

IN THE U.S.DISTRICT COURT
EASTERN DISTRICT OF PA.

The Eli Lilly & Company,
Plaintiff
vs
Wm. R. Warner & Co.,
Defendant.

"PLAINTIFF'S EXHIBIT, DEFENDANT'S PERFUME CARD A."

Chas. E. Riordon

Oct. 25,1916, Special Examiner.

1 Guerlain's Jockey
8 oz. $4 77
2 Allan's Janice
8 oz. $4.00
3 Piver's Le Trefle Incarnat.
16 oz. $8.52
4 Piver's Azurea
16 oz. $8.52
5 Houbigant's Parfum Ideal
8 oz. $11.11
6 Roger & Gallet's Peau d' Espagne
8 oz. $3.50
7 Palmer's Frangipanni
8 oz. $2.50
8 Roger & Gallet's Vera Violetta
8 oz. $4.00
9 Palmer's Rose Leaves
8 oz. $2.50
10 Palmer's Lilac Sweets
8 oz. $2.50
11 Pinaud's French Carnation
8 oz. $4.75
12 Dabrook's Locust Bloom
8 oz. $2.50
13 Rickecker's Ping Pong
8 oz. $2.50
14 Lighterr's Red Roses
8 oz. $2.00
15 Atkinson's White Rose
16 oz. $7.00
16 Lubin's Jockey Club
16 oz. $7.50

1 VOGUE
9 oz. ..... $3.00 20 oz. .....
2 FLORITA
9 oz. ..... $3.00 20 oz. .....
3, TREFLE QUINTUPLE
9 oz. ..... $3.00 20 oz. .....
4 ORIANA
9 oz. $4.00
5 PERFUME IDEAL FLOR.
8 oz. $6.00
6 PEAU D'ESPAGNE QUINT
9 oz. ..... $3.00 20 oz. .....
7 SPECIAL FRANGIPANNI
9 oz. ..... $3.00 20 oz. .....
8 FRENCH VIOLET
9 oz. ..... $3.00 20 oz. .....
9 FOREST ROSES
9 oz. ..... $2.00 20 oz. .....
10 LILAC SPRAY
9 oz. ..... $2.00 20 oz. .....
11 CARNATION PINK
9 oz. ..... $2.00 20 oz. .....
12 LOCUST BLOOM
9 oz. ..... $2.00 20 oz. .....
13 PING PONG
9 oz. ..... $2.00 20 oz. .....
14 RED ROSE
9 oz. ..... $2.00 20 oz. .....
15 WHITE ROSE EXTRA QUAD.
9 oz. ..... $2.00 20 oz. .....
16 JOCKEY CLUB
9 oz. ..... $2.00 20 oz. .....

U.S.District Court
Eastern District of Pennsylvania.
The Eli Lilly & Company
Plaintiff
vs
Wm. R. Warner & Co.,
Defendant,
"PLAINTIFFS EXHIBIT, DEFENDANT'S PERFUME CARD B"

Charles E. Riordan

Oct. 25,1916Special Examiner.

1 Guerlain's Jickey.
8 oz.....$4.77

2 Allen's Janice
8 oz.....$4.00

3 Piver's Le Trefle Incarnat.
16 oz.....$8.52

4 Piver's Azurea.
16 oz.....$8.52

5 Houbigant's Parfum Ideal.
8 oz.....$11.11

6 Roger& Gallet's Peaud'-Espagne
8 oz.....$4.78

7 Palmer's Frangipanni.
8 oz.....$2.50

8 Roger & Gallet's Vera Violetta.
8 oz.....$4.95

9 Palmer's Rose Leaves.
8 oz.....$2.50

10 Colgate's La France Rose.
8 oz.....$2.98

11 Palmer's Lilac Sweets.
8 oz.....$2.50

12 Pinaud's French Carnation.
8 oz.....$4.75

13 Dabrook's Locust Blossom.
8 oz.....$2.50

14 Ricksecker's Ping Pong.
8 oz.....$3 50

15 Alfred Wright's Mary Stuart.
8 oz.....$2.50

16 Lightner's Red Roses.
8 oz.....$3.00

17 Atkinson's White Rose.
16 oz.....$7.00

18 Colgate's Pansy Blossom
8 oz.....$2.98

19 Colgate's Clover Blossom
8 oz.....$2.98

20 Lubin's Jockey Club.
16 oz.....$7.50

21 Colgate's Cashmere Bouquet.
8 oz.....$3.

1 VOQUE.
9 oz.....$3.00 20 oz.....$6.00

2 FLORITA.
9 oz.....$3.00 20 oz $6.00

3 TREFLE QUINTUPLE.
9 oz..... $3.00 20 oz.....$6.00

4 ORIANA.
9 oz.....$4.00

5 PERFUME IDEAL FLOR.
8 oz.....$6.00

6 PEAU D'ESPAGNE QUINT.
9 oz.....$3.00 20 oz.....$6.00

7 SPECIAL FRANGIPANNI.
9 oz.....$3.00 20 oz. $6.00

8 FRENCH VIOLET.
9 oz.....$3.00 20 oz.....$6.00

9 FOREST ROSES.
9 oz.....$2.00 20 oz.....$4.00

10 FRENCH ROSES.
9 oz.....$1.75 20 oz.....$3.50

11 LILAC SPRAY.
9 oz .. .$2.00 20 oz.. ...$4.00

12 CARNATION PINK.
9 oz.....$2.00 20 oz.....$4.00

13 LOCUST BLOOM.
9 oz.....$2.00 20 oz.....$4.00

14 PING PONG.
9 oz.....$2.00 20 oz.....$4.00

15 MARIE STEWART.
9 oz.....$2.00 20 oz.....$4.00

16 RED ROSE.
9 oz.....$2.00 20 oz..... $4.00

17 WHITE ROSE EXTRA.QUAD.
9 oz. ....$2.00 20 oz.....$4.00

18 GOLDEN PANSY.
9 oz.....$1.75 20 oz.....$3.50

19 SHAMROCK.
9 oz ...$2.00 20 oz.....$4.00

20 JOCKEY CLUB.
9 oz.....$2.00 20 oz.....$4.00

21 BOUQUET DE FRANCE.
9 oz. ....$3.00 20 oz.....$6.00

COMPARATIVE PRICES OF
SPECIAL AND MISCELLANEOUS PREPARATIONS

ALL PRICES ARE NET.

Abbott's Saline Laxative Salts	3 oz. $2.00 doz. 6 oz. 4.00 doz. 16 oz. 9.00 doz.	The Abbott Alkaloidal Co.	
Alboline Liquid	1 pt. bottle each .40 5 pt. bottle each 1.75	McKesson & Robbin	
Aletris Cordial	8 oz. $8.00 doz.	Rio Chemical Co.	
Alkalithia	4 oz. 9.00 doz.	Keasbey & Mattison	
Alka-Men-Thym, W. & Co., part 2. An alkaline, non-irritating Antiseptic. Indicated as a local treatment for inflammation of the Respiratory tract, Tonsillitis, Bronchitis, etc.			
Alophen, Pills		Parke Davis & Co.	
Anti-Cold Tabs. Huyck's, Part 3		S. & H., Indicated in Colds and LaGrippe.	
Anticongestus, W. & Co., part 2. An antiphlogistic, plastic dressing, indicated as a local treatment for Congestion and Inflammation.			
nticongestus Comp., B A, part 2, W. & Co. Most efficient plastic dressing on the market. Therapeutic value much increased by opium, belladonna, aconite and subacetate of lead.			
Anti-Malarial Pills, Dr. Bonner's. Part 1, Warner's Anti-Malarial Tablets, Dr. Bonner's, Part 2, S. & H. Indicated as an Anti-Periodic, valuable in the treatment of Chills, Fever and Malaria.			
Antikamnia Powder	$1.00 oz.	Antikamnia Chemical Co.	
Antikamnia Powder Laxative	1.00 oz.	Antikamnia Chemical Co.	
Antikamnia Tablets	1.00 oz.	Antikamnia Chemical Co.	
Antikamnia Laxative Tablets	1.00 oz.	Antikamnia Chemical Co.	
Antikamnia and Codeine Tablets	1.00 oz.	Antikamnia Chemical Co.	
Antikamnia and Quinine Tablets	1.00 oz.	Antikamnia Chemical Co.	
Antikamnia and Quin. Lax. Tabs.	1.00 oz.	Antikamnia Chemical Co.	
Antikamnia and Salol Tabs.	1.00 oz.	Antikamnia Chemical Co.	
Antiphlogistine	½lb. $ 4.00 dozen 1 lb. 6.00 dozen 2 lb. 10.00 dozen 5 lb. 20.00 dozen		
Antiseptic Solution, W. & Co., Solutions, part 2			
Arsenauro	1 oz. bots. $8.50 doz.	Chas. Rome Parmalee Co	
Borolyptol	3 oz. $2.15 doz. 6 oz. 4.25 doz. 16 oz. 8.50 doz.	Palisade Mfg. Co.	
Bromidia	4 oz. 8.50 doz. 16 oz. 28.00 doz.		
Bromo Potash, W. & Co., Salts Eff., part 2.			

	per dos pints	Per 5 pint	per g
Gran. Effer. Salts, part 3, S. & H., for prices see Trade Confidential.			
Gran. Effer. Salts, Part 2, Warner for prices see Trade Confidential.			
Petrolene Oil, Part 3, S. & H.	$ 4 00	$ 1 40	$ 2
Aletris Comp. Part 3, S. & H.	9 00	3 00	4
Elix. Aletris Comp. H B, Part 1, E S Warner	7 20	2 70	4
	per lb.	per dos. ½ lb.	
G. E. Lithia Comp. Part 3, S. & H.	1 00	4 00	
	per dos. pints	Per 5 pint	per ga
Pills, Phenolpthalein Compound C. No. P 541	4 80	1 75	2 50
	Per M.	Per 500	per 10
	2 16	1 11	2
	2 50	1 30	2
½lb. Jars per doz.	2 75		
1 lb. " " "	4 45		
2 lb. " " "	7 00		
5 lb. Cans each	1 38		
½lb. Jar per doz.	3 05		
1 lb. " " "	4 95		
2 lb. " " "	8 60		
5 lb. Cans each	1 60		
Sugar Coated Pink	per M. 3 05	per 500 1 58	per 100
Chocolate Coated	3 00	1 52	34
	Per lb.	Per lb. in ½s	Per lb. in ½s
Anti-pain Powder, part 3, S. & H.	4 60	4 20	4 40
Anti-pain Powder Lax. part 3, S. & H.	4 60	4 20	4 40
Anti-pain Tabs. 5 gr. 32f, part 3, S. & H.	4 60	4 20	4 40
Anti-pain Tabs. Lax. 62g part 3, S. & H.	4 00	4 20	4 40
Anti-pain & Codeine Tabs. 62h. part 3, S. & H.	9 00	9 20	9 40
Anti-pain and Quinine Tablets 5 gr. 62j, part 3, S. & H.	4 60	4 80	5 00
Anti-pain and Quinine Laxative 5 gr. 62k, part 3, S. & H.	4 60	4 80	5 00
Anti-pain and Salol, 621, part 3, S. & H.	4 60	4 80	5 00
Anticongestus, W. & Co., see this list.			
Anticongestus Comp. W. & Co., see this list.			
	per doz	each	
Cataplasm of Kaolin, U. S. P., W. & Co., part 2	½lb. 2.40 1 lb. 3.84	5 lb. 1.38 10 " 2.50	
Plasticum, part 3, S. & H.	½lb 1.50 ½ " 2.40 1 lb. 3.84 2 lb. 7.20	5 lb. 1.35 10 " 2.50	
	per dos. pints	per 5 pint	per gal.
	4 40	1 50	2 25
Sol. Gold & Arsenic Brom. part 3, S. & H	per oz. 50	per ½pt 1 75	per pt. 6 75
Borobenzoformol, part 3, S. & H.	per doz pints 5 40	per 5 pint 2 00	per gal. 3 00
Chlora-Kaline, part 3, S. & H.	11 40	4 25	6 50
	per doz. doz. bot.	per lb. bottle	
	7 00	1 65	
	per doz.	per doz.	lb.

Antiseptic Solution, W. & Co., Solutions, part 3					
Arsenauro	1 oz. bots. $8.50 doz. Chas. Rome Parmalee Co	Sol. Gold & Arsenic Brom. part 3, S. & H	per oz. 50	per ½ pt 1 75.	per pt. 6 75
Borolyptol	3 oz. $2.15 doz. Palisade Mfg. Co. 6 oz. 4.25 doz. 16 oz. 8.50 doz.	Borobenzoformol. part 3, S. & H.	per doz pints 5 40	per 5 pint 2 00	per gal. 8 00
Bromidia	4 oz. 8.50 doz. 16 oz. 28.00 doz.	Chlora-Kaline, part 3, S. & H.	11 40	4 25	8 50
Bromo Potash, W. & Co., Salts Eff., part 2.			per doz. 4oz. bot. 7 00	per lb. bottle 1 65	
Bromo Soda, W. & Co., Eff. Salt, Part 2. For Sick and Nervous Headaches, due to Indigestion, Over Indulgence, Overwork, Close Confinement, Loss of Sleep, etc.			per doz. 25c. size 2 00	per doz. 1.00 size 8 00	1 lb. fancy jar each 2 25
Cactina Pellets	$2.00 doz. 25c size Sultan Drug Co.	Tablets Cactus Grandiflorus 2 min. 130f, part 2, S. & H.	per M 90	per 500 47	per 100 13
		Tablets. Cactus Grandiflorus 2 min. T267 part 1. Warner	90	47	13
		Glycerole Calendula Comp. part 3, S. & H.	per doz pints 3 40	per5 pt. 3 00	per gal. 6 50
Calenduline	2 ozs. $4.00 doz. Calenduline Co. 16 ozs. 12.00 doz.		Per M.	per 500	bot. 100
Calolactose Tabs. White. part 3	S. & H. A mild, effective and ideal preparation for the administration of Calomel. About 7000 in lb.	See also Calolactose Powder.	67	40	per doz. 1 60
			¼lb 1.15 per M.	¼lb 2.15 per 500	1 lb. 4.10 bot. 100
Calolactose Tabs. Pink, part 3	S. & H. About 3500 in lb.		67	40	per doz. 1 60
			¼lb. 63	¼lb 1.15	1 lb 2.15
Calolactose Powder Part 3	S. & H. Calolactose is composed of Calcme and Bismuth Subnitrate, each 1 part, Sugar of milk. (lactose) 8 parts. This mixture is triturated constantly for at least 10 hours.		per lb. 2 50	per lb. in ¼'s 2 60	per lb. in ¼'s 2 70
					1 oz bot per doz. 2 50
Campho Phenique	4 ozs. $8.00 doz. Phenique Co.	Phenolated Camphor, part 3, S. & H.	per pt. 1 50	per5 pt. 6 25	per gal. 9 00
			¼'s 1.63		
			¼'s 1.70		
Cascara Evacuant	Pts. per lb. $ 1?10 Park Davis & Co. per 5 pints 6.65 per gallon 10.50	F.E. Cascara with Podophyllin. F108 Part 2. Warner	per pt. 1 32	per 5 pint	per gal. 4 95
		F.E. Cascara with Podophyllin No. 114 Part 1. S. & H.	1 32		4 95
Castor'a	1¼ oz. $2.85 doz. The Centaur Co.	Castorole, part 3, S. & H.	per doz. pints 5 00	1 80	2 75
Castor Oil, Aromatized, White or Red. W. & Co., part 2.		Pure cold pressed Castor Oil, with Aromatics to make it Exceedingly Palatable, for Children and Adults	4 80	1 80	2 50
Castor Oil, Aromatic, White or Red. S. & H. part 3			4 80	1 80	2 50
Celerina	8 oz. 8.50 doz. Rio Chemical Co.	Tr. Celery Comp., No. 19, part 1. S. & H.	75		
		Tr. Celery Comp. No. 18, part 1 W. & Co.	75		
Chionia	8 oz. 8.00 doz. Peacock Chemical Co.	Elix. Chionanthus, part 3, S. & H.	7 80	2 75	8 75
		E73 Elix. Chionanthus, part 1, Warner	5 76	2 19	8 15
Coco Quinine	16 oz. 8.50 per doz. Eli, Lilly & Co. 5 pts. 3.30 per bottle	Quin Coco, part 3, S. & H.	7 20	2 50	3 75
Cod Liver Oil. Ext. of, Wampoles	16 oz. 8.50 doz. H. K. Wampole & Co.	Cod Liver Oil Comp. Ext. Cordial of formerly Tasteless, part 3, S. & H.	6 60	2 25	8 50
Cod Liver Oil, Wine of, Ext. of, with Malt and Hypophosphites, part 3 S. & H. Valuable in the treatment of Colds, LaGrippe and tubercular tendencies.			6 60	2 40	8 50
Cod Liver Oil Wine Ext. with Hypophosphites and Wild Cherry, Part 2, Warner			6 15	2 25	3 40
Creolin, Pearsin	16 oz. 8.00 doz. Merck & Co. 6 oz. 4.00 doz. 3 oz. 2.00 doz.	Kreosol, part 3, S. & H.	2 60	70	90
		Tabs. Hexamethylene-Tetramine 5 gr. part 3, S. & H.	per M 1 80	per 500 1 05	per 100 25
		Tabs. Formin, 5 gr., Part 1, Warner	1 95	99	24
Cystogen Tablets	25 Tabs. doz. bxs. $4.00 1 oz. each $1.00	Tabs. Hexamethylene-Tetramine 7½ gr. part 3, S. & H.	2 95	1 55	34
		Tabs. Formin, 7½ gr., part 1. Warner	2 85	1 44	33

ALL PRICES ARE NET.

Photolithographic Copy
"BLUE LIST"
(Original on blue paper)

(Photolithographic copy of page 1 of Complainant's Exhibit "Document No. 3"—referred to throughout the testimony and brief as defendant's "Blue List." The original copies of this exhibit are printed on blue paper.